No. 96-1482

Supreme Court, U.S.
FILED
JUL 3 1997
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LEXECON INC., *et al.*
Petitioners,
v.
MILBERG WEISS BERSHAD HYNES & LERACH, A PARTNERSHIP, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

JOINT APPENDIX

MICHAEL W. MCCONNELL
STEPHEN M. SHAPIRO
MICHELE L. ODORIZZI
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, Illinois 60603
(312) 701-7201

KENNETH S. GELLER
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

MICHAEL K. KELLOGG
Counsel of Record
MARK C. HANSEN
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK
SEAN A. LEV
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for Petitioners

[Additional counsel are listed on the inside cover]

PETITION FOR CERTIORARI FILED MARCH 18, 1997
CERTIORARI GRANTED MAY 19, 1997

83 pp

JEROLD S. SOLOVY
Counsel of Record
RONALD L. MARMER
C. JOHN KOCH
JEFFREY T. SHAW
JENNER & BLOCK
One IBM Plaza
Suite 4400
Chicago, Illinois 60611

MICHAEL MEEHAN
MEEHAN & ASSOCIATES
33 North Stone
Suite 830
Tucson, Arizona 85701
Counsel for Milberg Respondents

GERALD MALTZ
Counsel of Record
MILLER, PITT & MCANALLY, P.C.
One South Church Avenue
Suite 900
Tucson, Arizona 85701
Counsel for Cotchett Respondent

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Order Transferring Case to District of Arizona (J.P.M.L. June 3, 1993)	17
Order Denying Remand and Transferring Case to District of Arizona (D. Ariz. May 5, 1995)	20
Court of Appeals Order on Mandamus Petition (9th Cir. July 21, 1995)	22
Court of Appeals Decision (9th Cir. Dec. 20, 1996)	28

RELEVANT DOCKET ENTRIES

Date	Entry No.	PROCEEDINGS
1/25/92	1	COMPLAINT; jury demand—Civil cover sheet—Appearance(s) of Bettina Getz, Steven Ross Gilford, Vincent J. Connelly, Michele Odorizzi, Alan Norris Salpeter, Marcia Cotler, Gary S. Feinerman as attorney(s) for plaintiff Lexecon Inc., plaintiff Daniel R. Fischel with Rule 39 affidavits
6/7/93	122	MDL-ORDER pursuant to order of MDL Panel, this action is transferred into this district and is assigned to the Honorable Judge Roll and is to be consolidated with MDL-90-834
6/7/93	123	Original file, certified copy of transfer order and docket sheet received from USDC Northern District of Illinois
6/15/93	127	AMENDED COMPLAINT by plaintiffs (all)
7/2/93	130	MOTION to dismiss by Milberg Weiss defendants and for sanctions by Milberg Weiss defendants
7/13/93	137	MEMORANDUM IN SUPPORT by Milberg Weiss defendants in support of their motion to dismiss and motion for sanctions
7/13/93	139	REPLY by Milberg Weiss defendants in support of their motion to dismiss and motion for sanctions
7/13/93	140	APPENDIX to reply memorandum in support of Milberg Weiss defendants' motion to dismiss
11/29/93	169	CERTIFIED COPY OF ORDER by Judge John M. Roll that defendants' joint and individual motions to dismiss are GRANTED IN PART and Count 1 and 2 of plaintiffs' mandated complaint are DISMISSED. Defendants' joint and individual motions to

Date	Entry No.	PROCEEDINGS
		dismiss Count 4 are GRANTED IN PART. In all other respects, defendants' joint and individual motions are DENIED
12/28/93	177	MOTION for summary judgment by defendant Kevin P. Roddy
12/28/93	178	MEMORANDUM by defendant Kevin P. Roddy in support of his motion for summary judgment
12/28/93	180	JOINDER by defendant Milberg Weiss to defendant Roddy's motion for summary judgment
12/28/93	181	MOTION for summary judgment by defendant Milberg Weiss
12/28/93	182	MEMORANDUM by defendant Milberg Weiss in support of their motion for summary judgment with exhibits
1/7/94	185	PRELIMINARY RESPONSE to motions for summary judgment by plaintiff Lexecon and Daniel R. Fischel and CROSS-MOTION pursuant to Rule 56(f) to stay further briefing pending discovery by plaintiffs Lexecon and Fischel
1/13/94	186	MOTIONS for summary judgment by defendants Cotchett Illston, Joseph Cotchett and Susan Illston
1/24/94	189	RESPONSE by defendant Kevin P. Roddy in opposition to motion pursuant to Rule 56(f) to stay further briefing pending discovery by plaintiffs Lexecon & Fischel
1/24/94	190	RESPONSE by defendant Milberg Weiss in opposition to motion pursuant to Rule 56(f) to stay further briefing pending discovery by plantiffs Lexecon & Fischel

Date	Entry No.	PROCEEDINGS
1/26/94	191	JOINDER by defendants Cotchett Illston, Joseph Cotchett and Susan Illston in opposition to plaintiffs' Rule 56(f) motion
1/27/94	192	ORDER by Judge Roll granting motion pursuant to Rule 56(f) to stay further briefing pending discovery by plaintiffs Lexecon & Fischel; period for discovery will close 7/13/94. Plaintiffs' opposition to defendants' pending motion for summary judgment and all other dispositive motions must be filed by 8/12/94; hearing set for 3/28/94 is VACATED. . . discovery due 7/13/94; dispositive motions due 8/12/94; plaintiffs' motion to produce documents submitted for in camera inspection is GRANTED; all pending motions for reconsideration of this Court's order dated 11/29/93 are DENIED. . . see document for full details
3/7/94	206	ANSWER AND COUNTERCLAIM; jury demand by defendant Milberg Weiss against plaintiffs Lexecon Inc. and Daniel R. Fischel
3/8/94	207	ANSWER by defendants Cotchett Illston, Joseph Cotchett & Susan Illston to amend complaint
3/24/94	213	AMENDED ANSWER by Milberg Weiss defendants; jury demand
3/24/94	213	AMENDED COUNTERCLAIM by Milberg Weiss defendants
3/25/94	211	ORDER by Judge Roll granting motion for Rule 16 discovery conference by defendant Milberg Weiss; that defendants' motion for imposition of the New Rules of FRCP is denied; defendants' motion for complex case designation is granted; that defendants are to produce all documents identified by this court in its order of 1/27/94 no later than

Date	Entry No.	PROCEEDINGS
		3/25/94; defendant's claim of privilege log is denied; defendants' motion in limine are denied as premature; defendant's motion for limitation on scope of discovery is denied; defendants' oral motion to request plaintiffs to replead their complaint is denied; the oral motion to extend discovery is granted; discovery deadline re-set for 9/16/94; the transcript of 3/21/94 is SEALED. . . see document for full details
7/7/94	254	MINUTE ENTRY Judge Initials: JMR Court Reporter: John Davis, defendant. motion to compel production of documents by Milberg Weiss defendants is GRANTED to extent that plaintiff must produce documents prepared prior to date of settlement in Shields litigation; Motion to Compel Production Centrust Document MOOT; Motion to Compel Standard Chartered Document UNDER ADVISEMENT pending submission of deposition testimony; Motion to Strike and Sanctions is DENIED
7/20/94	271	ORDER by Judge Roll that defendant Milberg Weiss' motion to compel is GRANTED. Disclosure shall occur within 30 days of the date of this order
7/20/94	272	ORDER by Judge Roll granting in part and denying in part motion for reconsideration by plaintiff Lexecon, denying motion to clarify by plaintiff Lexecon
8/9/94	288	MOTION to refer the case back to the MDL Panel for remand to the Northern District of Illinois by plaintiffs (all)
8/9/94	289	MOTION for leave to file second amended complaint by plaintiffs (all) * * * FILED UNDER SEAL * * *

Date	Entry No.	PROCEEDINGS
8/23/94	307	MOTION to stay consideration of plaintiff's MDL remand motion by defendant Milberg Weiss
8/23/94	308	MEMORANDUM IN SUPPORT by defendant Milberg Weiss of motion to stay consideration of plaintiff's MDL remand motion by defendant Milberg Weiss
8/23/94	309	OPPOSITION to plaintiff's motion to refer for remand by defendant Cotchett Illston, defendant Joseph Cotchett, defendant Susan Illston and CROSS-MOTION to transfer case by defendant Cotchett Illston, defendant Joseph Cotchett, defendant Susan Illston
8/23/94	310	EXHIBITS in support of opposition to motion to refer for remand, cross-motion
8/26/94	311	ORDER by Judge John M. Roll granting motion to stay consideration of plaintiff's MDL remand motion by defendant Milberg Weiss, denying motion to set accelerated briefing and hearing schedule for Greenfield & Chimicles' motion for summary judgment
8/26/94	315	OPPOSITION by defendant Greenfield Chimicles to motion to refer the case back to the MDL Panel for remand to the Northern District of Illinois by plaintiff
8/29/94	321	REPLY Memo by plaintiff (all) in support of their motion to refer the case back to the MDL Panel for remand to the Northern District of Illinois by plaintiffs (all)
9/1/94	328	MOTION for reconsideration of Court's ruling of 8/24/94 by plaintiff
9/16/94	343	MOTION for recusal by plaintiff Lexecon

Date	Entry No.	PROCEEDINGS
9/21/94	346	ORDER by Judge Roll that plaintiffs are to conduct a reasonable inquiry, to include information readily available to them at this stage of discovery, and to answer request for admissions within 10 days of this order; granting in part and denying in part motion to compel by Cotchett Illston defendants
9/30/94	361	RESPONSE by defendant Milberg Weiss in opposition to motion for recusal by plaintiff Lexecon * * * * FILED UNDER SEAL * * * *
10/7/94	369	REPLY by plaintiffs (all) in support of motion for recusal by plaintiff Lexecon * * * * FILED UNDER SEAL * * * *
10/24/94	378	ORDER by Judge John M. Roll denying motion to compel production of documents withheld on purported attorney-client privilege grounds by Milberg Weiss defendants; denying motion to compel deposition testimony of Thomas Frederick by Milberg Weiss defendants; denying motion to exceed the page limitation by plaintiff
10/25/94	383	MOTION to quash subpoena by Richard M. Bilby for protective order by Richard M. Bilby
10/25/94	384	MOTION to strike the name of lead trial counsel from Lexecon's list of percipient witnesses by defendant Milberg Weiss
10/25/94	385	MEMOORANDUM IN SUPPORT by defendant Milberg Weiss of motion to strike the name of lead trial counsel from Lexecon's list of percipient witnesses by defendant Milberg Weiss * * * * FILED UNDER SEAL * * * *

Date	Entry No.	PROCEEDINGS
10/27/94	386	MOTION to vacate deposition by Richard M. Bilby
10/28/94	394	MEMORANDUM IN OPPOSITION by plaintiff Lexecon of motion to vacate deposition by Richard M. Bilby
10/31/94	405	MINUTE ENTRY Judge Initials: JMR Court Reporter: Chris Wright Telephone Hearing held regarding Motion to Quash Subpoena of RMB and Motion for Recusal. Deposition of RMB postponed until matter briefed and argued. Simultaneous briefs due 11/7/94. Telephone argument 11/16/94 at 8:30 a.m. See Order from Court regarding Motion for Recusal
11/2/94	399	ORDER by Judge John M. Roll denying motion for recusal by Plaintiff Lexecon
11/4/94	409	RENEWED MOTION to refer the case back to the Judicial Panel on MDL for remand to the Northern District of Illinois by plaintiff Lexecon Inc.
11/7/94	415	MEMORANDUM IN OPPOSITION by plaintiff Lexecon to motion to quash subpoena by Richard M. Bilby * * * * FILED UNDER SEAL * * * *
11/7/94	418	MEMORANDUM IN SUPPORT by defendant Milberg Weiss of motion to quash subpoena by Richard M. Bilby
11/16/94	430	MINUTE ENTRY Judge Initials: JMR court Reporter: Chris Wright Telephone Hearing held regarding Motion to Quash Subpoena. Court grants motion to quash subpoena by Richard M. Bilby, grants motion for protective order by Richard M. Bilby. ORDERED, attorney James Maguire is to file a notice with the Court under seal regarding subject matter discussed on the record within two weeks of receipt of this Minute Entry.

Date	Entry No.	PROCEEDINGS
11/21/94	443	SEPARATE RESPONSE by Cotchett Illston defendants to motion to refer the case back to the Judicial Panel on MDL for remand to the Northern District of Illinois by plaintiff Lexecon Inc.
11/21/94	444	SEPARATE RESPONSE to motion by defendant Greenfield Chimicles and CROSS-MOTION for removal to Arizona by defendant Greenfield Chimicles * * * FILED UNDER SEAL * * *
11/29/94	451	ORDER by Judge John M. Roll granting stipulation that Ernst & Young may file its response to Milberg Weiss' motion to compel production to compel production of documents listed on Ernst & Young's Log on or before 11/28/94 and that Milberg Weiss defendants shall have until 12/5/94 to file reply. . . see document for full details
11/29/94	452	ORDER by Judge John M. Roll granting in part and denying part motion to compel responses to discovery requests by Milberg Weiss defendants, granted as to interrogatories seeking information relating to the alleged tortious acts for which Lexecon seeks relief and Lexecon's witness information. Plaintiff is directed to answer interrogatories within 15 days of this order; denying motion for leave to retain and use documents allegedly produced inadvertently * * * * FILED UNDER SEAL * * * * by Milberg Weiss defendants granting motion for leave to file first amended counterclaims by Milberg Weiss defendants * * * * FILED UNDER SEAL * * * * granting in part and denying in part motion to compel production of documents and information by Milberg Weiss defendants by plaintiff *FILED UNDER

Date	Entry No.	PROCEEDINGS
		SEAL*; denying motion for reconsideration of Court's ruling of 8/24/94 by plaintiffs (all); telephonic hearing scheduled for 2:00 11/30/94 regarding issues relating to various Milberg Weiss motions to compel production. . . see document for full details
11/29/94	457	RESPONSE by defendant Milberg Weiss in opposition to motion to refer the case back to the Judicial Panel on MDL for remand to the Northern District of Illinois by plaintiff Lexecon Inc.
12/6/94	465	ORDER by Judge John M. Roll that motion to compel responses to discovery requests by Milberg Weiss defendants is granted in that Lexecon is ordered to produce the requested documents in existence up to-date that 7/87 report of Lexecon was submitted. Lexecon submits any other documents concerning Michael Milken, Drexel and Ivan Boesky which reflect Lexecon's pre-July 87' knowledge of activities of Michael Milken, Drexel and Ivan Boesky. In all other respects, motion to produce is DENIED. FO: granting motion to compel deposition testimony concerning Milken, Drexel and Boesky by Milberg Weiss defendants * * * * FILED UNDER SEAL * * * *; denying motion to compel production of documents and deposition testimony from Michael Milken by Milberg Weiss defendants; denying motion to compel production of documents from Paul Weiss by defendant Milberg Weiss
12/06/94	468	REPLY Memo by plaintiff Lexecon in support of their motion to refer the case back to the Judicial Panel on MDL for remand to the Northern District of Illinois by plaintiff Lexecon Inc.

Date	Entry No.	PROCEEDINGS
12/13/94	474	ORDER by Judge John M. Roll granting in part motion for clarification by defendants Milberg Weiss * * * * FILED UNDER SEAL * * * *. The Court's order of 11/28/94 is hereby clarified to the extent that it was not the Court's intent to compel disclosure now of any documents not previously requested by Lexecon during discovery; denying motion to strike Lexecon's corrected response to Milberg Weiss' motion to take deposition of certain unavailable third-party witnesses after the discovery cutoff by defendants Milberg Weiss; Lexecon may respond to the issue of where disclosure ought to take place, included in Milberg Weiss' motion for clarification, should that issue continue to remain unresolved
12/13/94	477	MOTION to dismiss amended counterclaim of Milberg Weiss by plaintiff Lexecon
12/14/94	478	REPLY by defendant Greenfield Chimicles in support of motion for removal to Arizona by defendants Greenfield Chimicles
12/15/94	480	ORDER by Judge John M. Roll granting motion to strike the name of lead trial counsel from Lexecon's list of percipient witnesses by defendant Milberg Weiss
12/15/94	481	ORDER by Judge John M. Roll denying motion for leave to file second amended complaint by plaintiffs (all)
12/19/94	485	SUPPLEMENTAL FILING by plaintiff Lexecon of additional authority in support of their renewed motion to refer the case back to the judicial panel on MDL for remand to the Northern District of Illinois
12/21/94	487	MOTION for transfer to this District by Milberg Weiss defendants

Date	Entry No.	PROCEEDINGS
12/22/94	491	ORDER by Judge Roll granting in part and denying in part motion to compel production of documents and deposition testimony by defendant Milberg Weiss; granting motion for leave to retain and use Milken documents allegedly produced inadvertently by Milberg Weiss defendants * * * * FILED UNDER SEAL * * * *; granting in part and denying in part motion to compel Rule 30(b)(6) deposition of Lexecon by defendant Milberg Weiss . . . see document for full details
12/27/94	493	MEMORANDUM IN SUPPORT by Milberg Weiss defendants in support of motion for transfer to this District of Milberg Weiss defendants
1/4/95	495	ORDER by Judge John M. Roll granting in part motion for leave to continue the depositions of David Paul and Charles Keating Jr. after their criminal proceedings are concluded by defendant Milberg Weiss; granting motion to take depositions of certain unavailable third-party witnesses after the discovery cutoff; granting in part motion to compel production of documents listed on Ernst & Young's Log by defendant Milberg Weiss. . . see document for full details
1/6/95	496	RESPONSE Memo by plaintiff Lexecon in opposition to motion for transfer to this District by Milberg Weiss defendants
1/18/95	506	RESPONSE Memo by defendant Milberg Weiss in opposition to motion to dismiss amended counterclaim of Milberg Weiss by plaintiff Lexecon
1/24/95	511	MEMORANDUM IN OPPOSITION by plaintiffs (all) to defendants' motions for summary judgment

Date	Entry No.	PROCEEDINGS
1/24/95	515	REPLY by defendant Milberg Weiss in support of motion for transfer to this District by Milberg Weiss defendants
1/26/95	516	ORDER by Judge John M. Roll that Ernst & Young disclose to Milberg Weiss counsel the memo authored by Miles Ruthberg dated 10/5/89, and Steve Miller, dated 7/31/90 (both copies). Milberg Weiss counsel are directed not to disclose these documents to Milberg Weiss without prior court approval or written stipulation by Ernst & Young
2/6/95	525	MOTION for preliminary injunction by defendant Milberg Weiss and for permanent injunction by defendant Milberg Weiss
2/6/95	526	MEMORANDUM IN SUPPORT by defendant Milberg Weiss of motion for preliminary injunction by defendant Milberg Weiss * * * * FILED UNDER SEAL * * * *
2/14/95	534	REPLY by defendant Kevin P. Roddy in suport of motion for summary judgment by defendant Kevin P. Roddy * * * * FILED UNDER SEAL * * * *
2/14/95	535	JOINDER by defendant Milberg Weiss in defendant Roddy's reply memo in support of his motion for summary judgment
2/14/95	537	REPLY MEMO by defendant Milberg Weiss in support of their motion for summary judgment regarding proposed sixth amended complaint by defendant Milberg Weiss
2/14/95	538	APPENDIX to Milberg Weiss defendants' reply memo regarding summary judgment * * * * FILED UNDER SEAL * * * *
2/17/95	544	MOTION for summary judgment on all remaining claims by defendant Milberg Weiss

Date	Entry No.	PROCEEDINGS
2/17/95	545	APPENDIX to Milberg Weiss defendants' motion for summary judgment on all remaining claims Vol. I & II
2/24/95	549	MEMORANDUM IN SUPPORT by defendant Milberg Weiss of motion for summary judgment on all remaining claims by defendant Milberg Weiss * * * * FILED UNDER SEAL * * * *
3/10/95	561	ORDER by Judge John M. Roll denying motion for preliminary injunction by defend ant Milberg Weiss, denying motion for permanent injunction by defendant Milberg Weiss. . . see document for full details
3/20/95	567	RESPONSE by plaintiff Lexecon in opposition to motion for summary judgment on all remaining claims by defendant Milberg Weiss * * * * FILED UNDER SEAL * * * *
4/3/95	576	JOINDER by defendant Cotchett Illston in Milberg Weiss defendants' motion for summary judgment on remaining claims
4/5/95	579	REPLY MEMO by defendant Milberg Weiss in support of motion for summary judgment on all remaining claims by defendant Milberg Weiss * * * * FILED UNDER SEAL * * * *
4/7/95	581	NOTICE OF APPEAL by defendant Milberg Weiss, defendant Patrick Coughlin, defendant William S. Lerach, defendant Kevin P. Roddy, defendant Leonard B. Simon, defendant Melvyn I. Weiss, defendant Patricia Hynes, defendant Stephen Steinberg, defendant Michael C. Spencer from District Court Order
4/24/95	582	ORDER by Judge John M. Roll granting motion for summary judgment on all remaining claims by defendant Milberg Weiss, granting

Date	Entry No.	PROCEEDINGS
		motion to dismiss amended counterclaim Milberg Weiss by plaintiff Lexecon, granting motion for summary judgment by defendants Cotchett Illston, Joseph Cotchett and Susan Illston, granting motion for summary judgment by defendant Milberg Weiss, granting in part and denying in part motion for summary judgment by defendant Kevin P. Roddy
5/5/95	586	ORDER by Judge John M. Roll denying motion for sanctions re: discovery orders by defendant Milberg Weiss, denying motion to strike Milberg defendants' amended response to plaintiffs' second set of interrogatories, No 3 directed to all defendants by plaintiff Lexecon Inc. granting motion for transfer to this District by Milberg Weiss defendants denying motion to refer the case back to the Judicial Panel on MDL for remand to the Northern District of Illinois by plaintiff by plaintiff Lexecon Inc.
5/17/95	591	ORDER by Judge John M. Roll denying motion for a stay of all proceedings pending a decision on their petition for a writ of mandamus by Lexecon
5/18/95		Notification by 9CCA of Appellate Docket Number 95-15759
5/24/95	597	MOTION to dismiss remaining claim of palintiff Fischel by Milberg Weiss
5/24/95	598	MOTION to dismiss all individual defendants besides Roddy from this case by Milberg Weiss
6/7/95	602	ORDER by Judge Roll that plaintiffs' claims against said defendants are dismissed with prejudice; dismissing defendants Susan Illston, Joseph Cotchett and Cotchett Illston

Date	Entry No.	PROCEEDINGS
7/3/95	634	NOTICE of Interlocutory Appeal by Lexecon Inc., Daniel R. Fischel from District Court order
6/13/95	608	MEMORANDUM by defendant Milberg Weiss concerning dismissal of claims against defendants aside from Roddy
6/15/95	610	MOTION for order dismissing plaintiff Fischel from the case by defendant Milberg Weiss
6/20/95	612	MUTUAL RELEASE AND SETTLEMENT AGREEMENT between and among Lexecon, Fischel and Greenfield & Chimicles by defendant Greenfield Chimicles
6/27/95	617	MOTION for order dismissing claims against defendants Patricia Hynes, Michael Spencer and Stephen Steinberg by defendant Milberg Weiss
7/6/95	626	ORDER by Judge John M. Roll that Lexecon's claim arising from the mailing of Roddy's letter to the National Law Review will proceed to trial only as to Kevin P. Roddy and the Milberg Weiss firm. As to all defendants, this claim is dismissed; that plaintiff Fischel is dismissed as plaintiff; that ill will evidence will be admitted at trial only to the extent that Roddy was aware of these incidents before he mailed the letter to the National Law Journal. This evidence may also be admissible for impeachment purposes to the extent that participants in these ill will occurrences are called to testify on behalf of defendant Roddy or the Milberg Weiss firm; dismissing defendants Michael C. Spencer, Stephen Steinberg, Patricia Hynes, Melvyn I. Weiss, Leonard B. Simon, William S. Lerach, Patrick Coughlin, Greenfield Chimicles, and plaintiff Daniel R. Fischel

Date	Entry No.	PROCEEDINGS
7/28/95	653	Certified Copy of 9CCA Order re 95-70380; petition for writ of mandamus is denied; motion to stay is denied as moot
8/1/95	681	Jury Verdict: We the jury, duly empaneled and sworn find in favor of the following party . . . . we find in favor of Kevin Roddy and Milberg Weiss and against Plaintiff Lexecon
8/7/95	684	JUDGMENT: the jury finds in favor of defendants Kevin Roddy and Milberg Weiss and against Plaintiff Lexecon. It is hereby ordered that judgment is entered in accordance with jury verdict and that this case is dismissed, terminating case
8/9/95	688	NOTICE OF APPEAL by plaintiff Lexecon Inc., plaintiff Daniel R. Fischel from District Court final judgment, as well as, from all non-final orders entered prior to final judgment
9/1/95	703	NOTICE OF CROSS-APPEAL by Milberg defendants from District Court judgment, order
1/28/97	714	COPY of 9CCA Mandate re affirming the decision of the District Court, re: 95-16754; affirming the decision of the District Court, re: 95-16595; affirming the decision of the District Court, re: 95-16403; affirming the decision of the District Court, re: 95-15759

June 3, 1993

Docket No. 834

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS AND LOAN SECURITIES LITIGATION

N.D. Illinois, C.A. No. 1:92-CV-7768

LEXECON, INC. *et al.*

v.

MILBERG WEISS BERSHAD SPECTHRIE & LERACH, *et al.*,

Before JOHN F. NANGLE, Chairman, MILTON POLLACK, ROBERT R. MERHIGE, JR., WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JR., JOHN F. GRADY, and BAREFOOT SANDERS, Judges of the Panel

---

TRANSFER ORDER

Before the Panel is a motion by the Milberg Weiss Bershad Specthrie & Lerach defendants in the above-captioned action (*Lexecon*) to transfer, pursuant to 28 U.S.C. § 1407, *Lexecon* to the District of Arizona for coordinated or consolidated pretrial proceedings with the previously centralized actions in this docket. All *Lexecon* defendants join in the motion. The *Lexecon* plaintiffs oppose transfer.

On the basis of the papers filed and the hearing held, the Panel finds that *Lexecon* shares common questions of

fact with previously centralized actions in MDL-834 and that transfer of this action to the District of Arizona will best serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. Specifically, these actions share questions of fact with an as yet unapproved settlement involving Touche Ross, Lexecon, Inc. and the investor plaintiffs in the Lincoln Savings investor class actions in MDL-834. Centralization under Section 1407 is thus desirable in order to prevent inconsistent pretrial and appellate rulings, avoid duplication of discovery, and conserve the resources of the parties, their counsel and the judiciary.

Although most litigations centralized under Section 1407 are under the supervision of one transferee judge, there have been instances where the Panel has assigned another transferee judge to handle one or more actions in particular litigation. *See Washington Public Utilities Group v. United States District Court*, 843 F.2d 319 (9th Cir. 1987); *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322 (8th Cir. 1985); *In re Department of Energy Stripper Well Exemption Litigation*, 472 F.Supp. 1282 (J.P.M.L. 1979); *In re Sugar Industry Antitrust Litigation*, 395 F.Supp. 1271 (J.P.M.L. 1975), 427 F.Supp. 1018 (J.P.M.L. 1977), MDL-201/201A (J.P.M.L. May 5, 1978) (unpublished order) and 471 F.Supp. 1089 (J.P.M.L. 1979). In light of the presiding MDL-834 transferee judge's recusal in *Lexecon*, we transfer this action for coordinated or consolidated pretrial proceedings with the previously centralized MDL-834 actions to a second transferee judge in the District of Arizona. We note that i) a massive document depository is located in the District of Arizona and ii) the Ninth Circuit has before it an appeal of an order in MDL-834 which may be relevant to the *Lexecon* claims.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, *Lexecon, Inc., et al. v. Milberg Weiss Bershad Specthrie & Lerach, et al.*, N.D. Illinois, C.A. No. 1:92-CV-7768, be, and the same hereby is, transferred to the District of Arizona and, with the consent of that court, assigned to the Honorable John M. Roll for inclusion in the coordinated or consolidated pretrial proceedings in this docket.

FOR THE PANEL:

/s/ John F. Nangle
JOHN F. NANGLE
Chairman

[Filed May 5, 1995]

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(CIVIL ORDER—GENERAL)

MDL 834 PHX RMB
Civil Case No. CV93-1087 PHX JMR

LEXECON

v.

MILBERG WEISS

Date: May 2, 1995

HONORABLE JOHN M. ROLL

Pending before the Court are cross-motions relating to venue, Milberg Weiss' motion for sanctions, and plaintiffs' motion to strike amended interrogatory response.

As to venue, plaintiffs argue that the MDL statute, 28 U.S.C. § 1407, requires this Court to transfer this case to the MDL panel so that it may return to the Northern District of Illinois. Plaintiffs admit that no court has so construed that statute. Substantial authority exists to the contrary. Multidistrict Litigation Rule 14(b); *In re Fine Paper Antitrust Litig.*, 685 F.2d 810 (3d Cir. 1982); *In re Air Crash Disaster Near Chicago, Illinois*, 476 F. Supp. 445 (J.P.M.L. 1979). Under this authority, the Court concludes that it has the power to transfer this action to itself or any other court. 28 U.S.C. §§ 1404 and 1406.

Under § 1404(a)'s balancing test, the Court finds that the interest of justice is best served by transferring this action to itself. In light of the one claim which remains in this case for trial, judicial economy heavily weighs in favor of this Court continuing to exercise jurisdiction over this case.

On the remaining motions in this matter, the Court finds that plaintiffs' motion to strike is moot and concludes that defendant's motion is not properly before the Court because Local Rule 1.10(j) requires that counsel first confer in an effort to resolve the dispute prior to seeking the Court's intervention. Furthermore, as to the merits, the imposition of sanctions is unwarranted.

Therefore, IT IS HEREBY ORDERED that plaintiffs' motion to refer the case back to the Multidistrict Litigation Panel IS DENIED and Milberg Weiss' motion to transfer the case to this Court IS GRANTED.

IT IS FURTHER ORDERED that plaintiffs' motion to strike amended interrogatory response IS DENIED as moot.

IT IS FURTHER ORDERED that Milberg Weiss' motion for sanctions IS DENIED.

IT IS FURTHER ORDERED that a pretrial conference is hereby set in this matter for Tuesday, May 30, 1995 at 4:00 p.m. Counsel are directed to submit a joint proposed pretrial order by May 22, 1995, in accordance with the form attached.

/s/ John M. Roll
JOHN M. ROLL
United States District Judge

[Filed Jul. 21, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-70380
DC# CV-93-1087-PHX

LEXECON INC., *et al.*,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
Respondent,

and

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,
Real Parties in Interest.

Petition for Writ of Mandamus
in the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted July 17, 1995
San Francisco, California

Before: FLETCHER, KOZINSKI and THOMPSON, Circuit Judges

MEMORANDUM *

In this petition for writ of mandamus, petitioners ask this court to: (1) vacate the district court's order which permanently transferred the above-entitled case to the District of Arizona pursuant to 28 U.S.C. § 1404(a); and (2) direct the district court to remand this case to the Northern District of Illinois pursuant to 28 U.S.C. § 1407. Petitioners also have filed a motion to stay the district court proceedings pending our decision. We deny the petition for writ of mandamus and deny the motion to stay as moot.

This court considers five factors in deciding whether a case is appropriate for mandamus relief: (1) whether the petitioner has no other adequate means, such as a direct appeal, to attain the relief desired; (2) whether the petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft-repeated error; and (5) whether the district court's order raises new and important problems, or issues of first impression. *Bauman v. United States Dist. Court*, 557 F.2d 650, 653 (9th Cir. 1977). The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Wash. Pub. Util. Group v. U.S. Dist. Court*, 843 F.2d 319, 323 (9th Cir. 1987) ("WPPSS").

Here, as to the first factor, we are not satisfied that petitioners cannot attain the relief they request on direct appeal. The case is scheduled for trial on July 25, 1995. The trial, we understand, will be of short duration. The transfer order can be appealed immediately along with other issues in the event the petitioners lose on the merits.

As to the second factor, petitioners contend the expense and inconvenience of what may be an unnecessary

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

trial in the District of Arizona meets the second *Bauman* factor. They rely on *Sunshine Beauty Supplies* for the proposition that "the prejudice that results from an erroneous transfer order is of a type not correctable on appeal." *Sunshine Beauty Supplies v. U.S. Dist. Court*, 872 F.2d 310, 311 (9th Cir. 1989).

Petitioners' reliance on *Sunshine Beauty Supplies* is misplaced. There, the district court's transfer order would have required the plaintiff, who sought confirmation of an arbitration award in the district court in California, to travel to Texas to present its claim. Here, the parties are already before the federal district court in Arizona and have been for more than a year as they pursued discovery. The district court's order transferring the present case to itself for trial simply leaves the parties where they are. It does not force them to go to another district to try their case. Petitioners have not shown how they would be prejudiced by conducting what is scheduled to be a four-day trial in the district where they have been litigating for more than a year. *Cf. Varsic v. U.S. Dist. Ct.*, 607 F.2d 245, 252 (9th Cir. 1979) (substantial prejudice shown by plaintiff who would have had to travel some 3,000 miles to prosecute his action).

As to the third factor, we cannot say the district court's order transferring this case to itself for trial is clearly erroneous as a matter of law. A question of law is clearly erroneous if we are left with the definite and firm conviction that a mistake has been made. *United States v. Harper*, 729 F.2d 1216, 1222 (9th Cir. 1984). Here, petitioners contend the district court clearly erred by: (1) ignoring 28 U.S.C. § 1407, which instructs that the case be remanded for trial to the Northern District of Illinois; and (2) transferring the case to itself under 28 U.S.C. § 1404(a).

We are not prepared to say that these contentions lack merit. However, despite what appears to be a clear statutory mandate, Multidistrict Litigation Rule 14(b)

explicitly authorizes a transferee court to transfer the action to itself for trial pursuant to 28 U.S.C. § 1404(a) and the district court's decision is supported by case law. *See In Re Fine Paper Antitrust Litigation*, 685 F.2d 810, 820 (3rd Cir. 1982); *Pfizer v. Lord*, 447 F.2d 122, 125 (2d Cir. 1971); *see also WPPS* at 326 (transferee court has authority to sua sponte change venue). Further, petitioners have cited no case law to the contrary. Although upon review on direct appeal, we might well reach the opposite result, it is not possible for us to hold at this juncture that the district court's decision is clearly erroneous. *See Harper*, 729 F.2d at 1222. In any direct appeal the merits panel is free to examine all of the issues.

Although there may be oft-repeated error in other circuits, petitioners do not demonstrate how the fourth *Bauman* factor applies in this circuit. While the fifth factor may be met, we conclude that in this case resolution is available on direct appeal in a setting more conducive to adequate briefing and full deliberation. We see no emergent need for instant resolution.

Accordingly, the petition for writ of mandamus is DENIED. The motion to stay is denied as moot.

Kozinski, Circuit Judge, dissenting.

I would grant the writ to correct an egregious, oft-repeated error in the interpretation of 28 U.S.C. §§ 1404, 1407. Section 1407(a) authorizes the Multidistrict Panel to transfer cases for *pretrial* proceedings; after those proceedings are completed, and before trial, "[e]ach action so transferred *shall* be remanded by the panel." (emphasis added). It's hard to imagine a clearer statutory command, or one more widely ignored.

Starting with the Second Circuit's summary treatment in *Pfizer, Inc.* v. *Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971), the federal courts have simply disregarded the

statutory mandate *Pfizer* and a few subsequent cases have recognized they weren't following the statute, but justified their departure on grounds of policy or convenience. *See, e.g., Pfizer*, 447 F.2d at 124-25 (rejecting as absurd a result that would delay section 1404(a) motions until after remand); *In re Air Crash Disaster Near Hanover, New Hampshire*, 342 F. Supp. 907, 909 (D.N.H. 1971) ("I must recognize candidly that there is nothing in the language of 28 U.S.C. § 1407(a) or 1404(a) which directly allows, or even suggests, that the transferee judge has the power to transfer cases to his district, or any district, for purposes of trial."). Most have simply taken their place at the head of an ever-growing string cite. The Multidistrict Panel went so far as to enshrine this unlawful practice into one of its rules, J.P.M.L.R.P. 14(b), and the Federal Judicial Center's *Manual for Complex Litigation (Third)* § 21.61 (1995), mentions it as a standard option. Seldom have so many been so consistently wrong.

The time has come to put a stop to this illicit practice by saying loud and clear that the Multidistrict Panel assigns cases only for pretrial proceedings; it doesn't grant proprietary rights in them. Indeed, I consider it unseemly for district judges who have been entrusted cases for limited purposes to routinely glom onto them. It's true that section 1407(a) gives transferee courts power over pretrial proceedings and venue transfer motions under section 1404(a) fall under that general heading. But this presents no irreconcilable conflict between sections 1404 and 1407: Pretrial proceedings under 1407 are obviously limited to those raising issues common to other cases, primarily discovery; that's the entire point of the multidistrict process. Under section 1407, the Multidistrict Panel retains the power to transfer the case and that power is carefully limited to accomplish the statute's purpose. This precludes use of the general transfer section by district judges to subvert the panel's responsibility.

Section 1407 reflects an important policy choice: Cases may be transferred to remote locations, but only for the duration of pretrial procedures. When it comes to conducting a trial (and resolving other dispositive matters) plaintiffs retain their ancient right to select the forum. Had Congress meant to empower the Multidistrict Panel to reassign cases for resolution of dispositive matters, including trial, it would have drafted the statute much differently. This is a policy choice federal judges are bound to respect, regardless of their views of efficiency or their fondness for particular cases.

Petitioners here were dragged hundreds of miles from their home district in Illinois to appear before a judge in Arizona who had no familiarity with the case or expertise in the issues; they participated in no common proceedings; they benefitted from no coordinated discovery; and they are now forced to go to trial in the remote district because, having needlessly been required to spend so much time in Arizona, it makes no sense to send them back. There's a warped logic to each step in this process, but the net effect is to undercut the important policy of section 1407. That the matter comes up on appeal so seldom —and will likely be washed out by trial or settlement before it can come to us again in this case—makes it the more urgent for us to resolve the issue and put an end to an illicit practice that has developed willy-nilly during the last quarter century. If not we, who? If not now, when?

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 95-15759, 95-16403, 95-16595 and 95-16754

IN RE AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON INC.; DANIEL R. FISCHEL,
Plaintiffs-Appellees,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; PATRICK COUGHLIN; WILLIAM S. LERACH; KEVIN P. RODDY; LEONARD B. SIMON; MELVYN I. WEISS; PATRICIA HYNES; MICHAEL C. SPENCER; STEPHEN R. STEINBERG,
Defendants-Appellants.

IN RE AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON INC.; DANIEL R. FISCHEL,
Plaintiffs-Appellants,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; PATRICK COUGHLIN; WILLIAM S. LERACH; KEVIN P. RODDY; LEONARD B. SIMON; MELVYN I. WEISS; PATRICIA HYNES; MICHAEL C. SPENCER; STEPHEN R. STEINBERG, COTCHETT, ILLSTON & PITRE; JOSEPH COTCHETT; SUSAN ILLSTON,
Defendants-Appellees.

IN RE AMERICAN CONTINENTAL CORPORATION/LINCOLN SAVINGS & LOAN SECURITIES LITIGATION.

LEXECON INC.; DANIEL R. FISCHEL,
Plaintiffs-Appellants,
Cross-Appellees,

v.

MILBERG WEISS BERSHAD HYNES & LERACH, a partnership; PATRICK COUGHLIN; WILLIAM S. LERACH; KEVIN P. RODDY; LEONARD B. SIMON; MELVYN I. WEISS; PATRICIA HYNES; MICHAEL C. SPENCER; STEPHEN R. STEINBERG,
Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court
for the District of Arizona,
John M. Roll, District Judge, Presiding.
D.C. No. CV-93-01087-JMR

Argued and Submitted June 13, 1996
Decided Dec. 20, 1996

Before: SNEED, PREGERSON and KOZINSKI, Circuit Judges.

SNEED, Circuit Judge:

Of the many consequences of the failure of Lincoln Savings and Loan and its parent, American Continental

Corporation, the litigation that produced these consolidated appeals was just one. At the heart of these appeals is a suit by Lexecon Inc. against a number of the attorneys who represented the consolidated class of investors who lost money in the collapse of Lincoln Savings and its parent. Lexecon is a law and economics consulting firm that frequently serves as a defense expert in securities class actions prosecuted by the law firms that are defendants here. Lexecon had prepared several reports for Lincoln Savings and American Continental, and consequently became a target of the class' claims. In due course these claims were resolved. Thereafter Lexecon and its principal, Professor Daniel R. Fischel of the University of Chicago Law School, brought an action for, inter alia, malicious prosecution and defamation in federal district court for the Northern District of Illinois against several of the class attorneys—Milberg Weiss Bershad Hynes & Lerach and affiliated attorneys ("Milberg Weiss"), and Cotchett Illston & Pitre and affiliated attorneys ("Cotchett").[1] The underlying theory is that Milberg Weiss and Cotchett wrongfully dragged Lexecon into the Lincoln Savings litigation to satisfy a personal vendetta against Lexecon and Fischel. The Judicial Panel on Multidistrict Litigation ("JPML") transferred this case to the District of Arizona and assigned it to Judge John M. Roll.

The resolution of Lexecon's claims in Judge Roll's court generally was unfavorable, as were its rulings on Milberg Weiss' counterattacks. These have resulted in four appeals to this court which have been consolidated.

In No. 95-16595, Lexecon appeals the adverse judgment on its malicious prosecution and abuse of process claims and the denial of its motion for leave to amend, as well as the denial of its motion to remand the case to

[1] The firm of Greenfield & Chimicles was also a defendant initially, but is not involved in these appeals.

Illinois. In No. 95-16403, Lexecon appeals from the final judgment in favor of the Cotchett defendants.

Milberg Weiss appeals, in No. 95-15759, the district court's denial of its efforts to obtain injunctive relief against Lexecon's prosecution of its claims, and, in No. 95-16754, the dismissal of its counterclaims against Lexecon.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm the judgments of the district court.

I.

SOURCES OF THIS LITIGATION

Following the collapse of Lincoln Savings, investors residing in many districts of the federal judicial system brought actions charging violations of federal securities laws and RICO. In due course, these cases were transferred to the District of Arizona, consolidated into MDL 834 (sometimes designated as "*Shields*" or "*Lincoln Savings*") and assigned to Judge Richard Bilby.

As early as 1990, the consolidated plaintiff class, now represented by (among others) Milberg Weiss and Cotchett, sought to add Lexecon and Fischel as defendants by filing a fifth amended complaint. Judge Bilby denied their motion to do so without prejudice. In February 1991, Judge Bilby granted the class' motion to file a sixth amended complaint, which added only Lexecon as a defendant, and alleged that:

> during 1987 and 1988 defendant Lexecon was engaged by ACC/Lincoln to perform services, including writing reports advocating the safeness of Lincoln's operations and the value of ACC/Lincoln's assets which were submitted to federal and state regulators in order to persuade them not to take regulatory action adverse to Lincoln.

Following a period of discovery, Lexecon's motion for summary judgment was denied. *See In re American Con-*

tinental Corp./Lincoln S & L Sec. Litig., 794 F.Supp. 1424, 1448-49 (D.Ariz.1992). Judge Bilby found there existed material issues as to whether Lexecon's reports were false and misleading, and whether Lexecon possessed reckless scienter as to Lincoln's fraudulent activities. In March 1992, the trial commenced. Almost four months later, and shortly before the close of evidence, Lexecon moved for a directed verdict. Judge Bilby denied the motion, again finding a jury question as to the level of Lexecon's knowledge of, and involvement in, Lincoln Savings' actions and practices.

On June 22, 1992, the class attorneys and Lexecon's counsel met in Judge Bilby's chambers to consider a means by which Lexecon's exposure to a jury verdict could be resolved without harmful consequences to its professional credibility and reputation. In furtherance of this end, Lexecon urged that any agreement that might be reached not be designated a "settlement." To accommodate Lexecon's concern, the term "resolution" was adopted. The terms of the resolution provided: First, that the court would enter an order dismissing Lexecon without prejudice; second, that the parties would sign a stipulation dismissing Lexecon with prejudice, which stipulation would be held by Judge Bilby to be entered on the court's record only if a new suit was initiated against Lexecon on the same claims; and, third, that Lexecon would provide class services as a subcontractor to Touche Ross who, as another defendant in MDL 834, had settled its liability for $7.5 million. The resolution also placed restrictions on class counsel's ability to cross-examine Lexecon experts in future lawsuits about Lexecon's involvement in MDL 834.

This unusual arrangement was implemented, although because of disagreements between Lexecon and class counsel, Lexecon discharged its obligations by turning over to the class the approximately $700,000 it had received in professional fees from Lincoln Savings and American Con-

tinental, rather than performing the class services. This discharge was accomplished in October 1992.

Those who then thought that the concerns of Lexecon had been relieved were wrong. On November 25, 1992, Lexecon filed in the Northern District of Illinois (Lexecon's home state) the action now before us on appeal. The complaint set forth claims for malicious prosecution, abuse of process, tortious interference, defamation, and common law and statutory commercial disparagement. In June 1993, the JPML transferred the case to the District of Arizona for consolidation with MDL 834, and assigned it to Judge Roll because Judge Bilby had recused himself.

Judge Bilby's recusal obviously resulted in part from his reaction on learning of Lexecon's suit in Illinois. He arranged a telephonic hearing held on December 7, 1992, and therein charged Lexecon with what he viewed as its incorrect portrayal of the resolution of its role as a defendant in MDL 834. Following this hearing and the submission of letter briefs by the parties, Judge Bilby placed an order in the record of MDL 834 in which he found portions of Lexecon's Illinois complaint to be "a false description of the conditions under which Lexecon was dismissed from this case." [2] The key portions of his

---

[2] The text of this order reads as follows:

On August 12, 1992, Lexecon Inc. was dismissed from the above captioned matter. As this dismissal was without prejudice the Court retained jurisdiction and uses its powers now to clarify the terms and conditions of that dismissal. Moreover, pursuant to Fed.R.Civ.P. 60(a) the Court of its own initiative may correct any errors or omissions of the record. This Order in no way "rewrites" history, rather, it serves to clarify the terms and conditions of the Class Plaintiff and Lexecon's agreement. This act of Court is required due to certain allegations made by Lexecon in *Lexecon Inc. v. Milberg Weiss Bershad Spechrie & Learch* [sic], Case No. 92 C 7768 (N.D.Ill. Nov. 25, 1992), a suit filed against Class Plaintiffs' counsel in the Northern District of Illinois.

Specifically, in that Complaint Lexecon alleges:

> 63. In June 1992, after all the evidence was in, but before closing arguments, Defendants finally agreed to dismiss Lexe-

order disputed Lexecon's characterization of its payment to the Lincoln Savings class as "voluntary," and of the resolution as a termination of the litigation in Lexecon's favor:

---

con, implicitly acknowledging the lack of merit in their complaint.

64. At the same time, because it believed that its professional services had been misused by Lincoln and [Charles H.] Keating [Jr.], Lexecon voluntarily undertook to benefit the class by providing claims administration services (computerizing mailing lists, processing claims and the like). When Defendants' complaints to the court made it impossible for Lexecon to provide these services, Lexecon decided to benefit the class instead by voluntarily returning the professional fees paid to it by Lincoln and Keating . . .

* * * *

92. The *Shields* case was terminated in Lexecon's and Fischel's favor.

Lexecon Inc. v. Milberg Weiss Bershad Spechrie & Learch [sic], Complaint, ¶ 63, ¶64 and ¶92.

The Court finds these paragraphs to be a false description of the conditions under which Lexecon was dismissed from this case. Although counsel for Lexecon at hearing argued that ¶ 93 [sic] is pled merely to satisfy one of the elements of malicious prosecution, it does not meet with reality and is factually incorrect.

The Class Plaintiffs/Lexecon resolution was a bargained-for exchange wherein consideration flowed both ways. Lexecon agreed to perform through Touche Ross certain administrative services to the Class Plaintiffs. Subsequently, Lexecon paid approximately $900,000 in cash instead of performing the services. (footnote omitted)

In return, Plaintiffs' counsel agreed to dismiss Lexecon from the case without prejudice and to not cross-examine the Lexecon experts about any "settlement" by Lexecon of the case. The fact that a case was filed and subsequently resolved without mention of the terms was always to be a proper subject of cross-examination. This aspect of the resolution was included because Lexecon and Mr. Fischel were concerned that if the term "settlement" was used, Lexecon experts would be open to in-depth cross-examination in courts across the country with consequent injury to its business. Hence, the term "settlement," and the connotations it might imply, was explicitly avoided and the term "resolution" used instead.

Counsel for Lexecon has furnished the Court with a portion of a transcript from the Eastern District of Tennessee, Northern District in a case captioned, *FDIC v. Ernst & Whitney*, CIV 3-87-364 (E.D.Tenn. Oct. 1, 1992) as evidence of Class Plaintiffs' Counsels' bad faith breach of the resolution. A copy of this transcript is attached as Exhibit "A".

It is the finding of this Court that Mr. Spencer cross-examined the Lexecon expert in accordance with the agreement reached with Lexecon in MDL 834 in every respect. Mr. Spencer never made any reference to the MDL 834 settlement before the jury in the Tennessee case, nor asked any questions in that case concerning a settlement in MDL 834. Indeed, Ms. Brickell on redirect, made the point that the FDIC had hired Lexecon *after* the Lincoln project. As long as Plaintiffs' counsels' future conduct is in accordance with Mr. Spencer's cross-examination in the Tenessee case, then the Lexecon resolution will not have been breached.

Moreover, under no circumstances was the Class Plaintiffs/Lexecon compromise a resolution in favor of *either* party or, more importantly, an adjudication on the merits. Instead, it was a bargained-for resolution of a disputed matter from which both parties benefited.

> The Class Plaintiffs/Lexecon resolution was a bargained-for exchange wherein consideration flowed both ways.
>
> . . .
>
> Moreover, under no circumstances was the Class Plaintiffs/Lexecon compromise a resolution in favor of either party or, more importantly, an adjudication on the merits. Instead, it was a bargained-for resolution of a disputed matter from which both parties benefited.

Lexecon's attempt to appeal this order to this court failed because there was as yet no final judgment in MDL 834. Lexecon took no appeal from the final judgment subsequently entered in March 1994.

Meanwhile, Judge Roll had begun his work on the case. In November 1993 he dismissed Lexecon's malicious prosecution and abuse of process claims. *In re American Continental Corp./Lincoln S & L Sec. Litig.*, 845 F.Supp. 1377, 1383-86 (D.Ariz.1993). All the defend-

ants in this case then answered, and Milberg Weiss filed counterclaims for breach of contract, fraud, unjust enrichment, and promissory estoppel. Discovery proceeded, followed by the defendants' motions for summary judgment.

In March 1994, before Judge Roll resolved the summary judgment motions, final judgment was entered in MDL 834. Lexecon thereupon moved under 28 U.S.C. § 1407 for a remand of its case to the Northern District of Illinois. Judge Roll instructed Lexecon to renew this motion after the close of discovery, which Lexecon did in November 1994. In response, Milberg Weiss moved to make the transfer to Arizona permanent under 28 U.S.C. §§ 1404(a) and 1406, and additionally moved for preliminary and permanent injunctions against the pursuit of this action, as well as all other claims made by Lexecon. Judge Roll denied the latter motion, and Milberg Weiss appealed. No. 95-15759.

Prior to ruling on the remand and transfer motions, Judge Roll granted summary judgment against Lexecon on its claims of tortious interference, commercial disparagement, and defamation based on the dissemination of Milberg Weiss' sixth amended complaint. *In re American Continental/Lincoln S & L Sec. Litig.*, 884 F.Supp. 1388 (D.Ariz.1995). Lexecon's defamation claim based on a sentence in a letter written by a Milberg Weiss partner, Kevin P. Roddy, to, and which appeared in, *The National Law Journal*, survived. Judge Roll also dismissed Milberg Weiss' counterclaims. *Id.* at 1397. Because the Cotchett defendants, who were never Lexecon's principal target in this litigation, had no part in the Roddy letter, Judge Roll entered a final judgment in their favor pursuant to Fed. R.Civ.P. 54(b). Lexecon timely appealed that judgment. No. 95-16403.

Thereafter, Judge Roll entered an order denying Lexecon's motion to return the case to the JPML for remand to the Northern District of Illinois, and granting the Milberg Weiss motion to make the transfer to the District of

Arizona permanent. Lexecon appealed the remand and transfer decision to this court by means of a petition for writ of mandamus, which was denied without prejudice as to Lexecon's raising the issue on direct appeal.

The climactic event in Judge Roll's court occurred on July 25-28, 1995, when Lexecon's defamation claim based on the Roddy letter to *The National Law Journal* was tried to a jury. The jury verdict favored Milberg Weiss. Lexecon appealed the subsequently entered final judgment, in particular the district court's transfer order and its dismissal of Lexecon's malicious prosecution and abuse of process claims. No. 95-16595. Milberg Weiss cross-appealed the dismissal of its counterclaims. No. 95-16754.

The order in which this court will address the issues before us on this appeal is as follows:

1. The permanent transfer of Lexecon's case from the Northern District of Illinois to the District of Arizona.
2. The denial of Milberg Weiss' motion for preliminary and permanent injunctions against the pursuit by Lexecon of its claims against Milberg Weiss and Cotchett.
3. The dismissal of Lexecon's malicious prosecution and abuse of process claims.
4. The dismissal of Milberg Weiss' counterclaims.

II.

THE PERMANENT TRANSFER TO THE DISTRICT OF ARIZONA

Nos. 95-16595 and 95-16403

The JPML transferred Lexecon's action to the District of Arizona pursuant to its authority under 28 U.S.C. § 1407(a), which states:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section. . . . Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated[.]

The decision of the court below to transfer Lexecon's sole surviving claim to itself for trial, and its refusal to refer the case to the JPML for remand to Illinois, are vigorously challenged by Lexecon—and not for the first time.

Prior to the trial on the defamation claim, Lexecon brought before this court a petition for a writ of mandamus seeking: (1) to vacate the district court's order permanently transferring the remaining claim to the District of Arizona; and (2) to direct the district court to refer the case to the JPML for remand to the Northern District of Illinois. In an unpublished disposition, this court denied the petition and, while recognizing that Lexecon's arguments based on 28 U.S.C. §§ 1407 and 1404(a) might not lack merit, pointed out that they were contrary to existing case law and Multidistrict Litigation Rule 14(b). We explicitly recognized that the issue could be raised in an appeal on the merits. The dissent vigorously argued that 28 U.S.C. § 1407(a) authorizes the JPML to transfer a case for pretrial proceedings only, precluding a section 1404(a) transfer for a trial on the merits by the transferee court to itself, and that Multidistrict Litigation Rule 14(b) lacks a statutory basis. We now revisit these issues.

We review the district court's transfer under 28 U.S.C. § 1404(a) for an abuse of discretion. *Lou v. Belzberg*, 834 F.2d 730, 734 (9th Cir.1987), *cert. denied*, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988). We review de novo the district court's interpretation of its duties under 28 U.S.C. § 1407. *Monrad v. FDIC*, 62 F.3d 1169, 1171 (9th Cir.1995).

A. *Authority for the Section 1404(a) Transfer*

The power of a section 1407 transferee court to transfer a case to itself for trial has been recognized, explicitly or implicitly, by the courts that have considered the issue.[3] Patricia D. Howard, the Clerk of the JPML, has stated:

> Although the Panel's power for the most part is limited to transfer for pretrial only, it is not uncommon for a transferee judge assigned by the Panel to transfer to his own or another district under 28 U.S.C. §§ 1404(a) or 1406 the actions which were previously assigned to him or her by the Panel under Section 1407.[4]

---

[3] *See, e.g., In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d 528, 532 n. 7 (4th Cir.1996); *Washington Pub. Util. Group v. United States Dist. Ct.*, 843 F.2d 319, 326 (9th Cir.1987); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1178 (D.C.Cir.1987), *aff'd*, 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989); *Kohr v. Allegheny Airlines*, 504 F.2d 400, 402 (7th Cir.1974), *cert. denied*, 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975); *Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir.1971); *Matter of Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F.Supp. 330, 332 (N.D.Ill.1990); *In re Air Crash Disaster*, 476 F.Supp. 445, 450 (J.P.M.L.1979); *In re CBS Color Tube*, 342 F.Supp. 1403, 1404-05 (J.P.M.L.1972).

[4] Patricia D. Howard, "A Guide to Multidistrict Litigation," 124 F.R.D. 479, 479 (1989); *see also* Stanley A. Weigel, "The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts," 78 F.R.D. 575, 581 n. 42 (1977); Moore's Federal Practice, *Manual for Complex Litigation* ¶ 31.13 at 251 n.785 (3d ed. 1995) ("Although transfer by the panel under § 1407 is only for pretrial purposes, the transferee court may find it appropriate to transfer cases to itself for trial under 28 U.S.C. § 1404 or § 1406.").

Permitting the transferee court to transfer a case to itself upon completion of its pretrial work often promotes efficiency in the disposition of the case or cases.[5] The time required for a new judge to become acquainted with the litigation is eliminated, as is the possibility of conflicting or duplicative rulings and proceedings. The above reasons strongly favored trial by the transferee court in this case, where pretrial proceedings left only one claim to be resolved by a trial that was scheduled to begin immediately and conclude in four days.

Moreover, the transferee court is empowered to dispose of the cases transferred to it by means of summary judgment or dismissal.[6] Therefore, logic supports its ability to dispose of the case, at least under the circumstances present here, by trial.

Despite longstanding practice and the efficiency arguments, Lexecon argues that 28 U.S.C. § 1407(a) requires remand for trial. The provision states in relevant part:

> Each action so transferred *shall be remanded by the panel* at or before the conclusion of such pretrial proceedings to the district from which it was transferred *unless it shall have been previously terminated* (emphasis added).

Equally specific is JPML R. 14(b), promulgated under the authority granted the JPML by 28 U.S.C. § 1407(f):

[5] Judge Kozinski, in his dissent, decries the fact that in multidistrict litigation cases concerns for judicial economy trump the usual deference to a plaintiff's choice of forum. We fail to see the problem here. Judicial economy is extremely important in multidistrict litigation: sufficiently important that Congress enacted a special statute, 28 U.S.C. § 1407, to ensure that in multidistrict cases the interest in judicial economy would not be overidden by deference to a plaintiff's choice of forum.

[6] *See, e.g., In re Food Lion, Inc.*, 73 F.3d at 532; *In re Korean Air Lines*, 829 F.2d at 1178; Weigel, "The Judicial Panel on Multidistrict Litigation," 78 F.R.D. at 582-83.

> Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406.

This conflict between statute and rule, while apparent, is not real.[7] Congress in enacting section 1407 in 1968 was concerned with the emerging phenomenon of complex, multidistrict litigation. Its focus was upon creating and defining the functions of the JPML, not on redefining or circumscribing the traditional powers of the district court to which a case has been transferred. This is made reasonably clear by the House Report accompanying the

[7] The dissent contends that Judge Roll contravened the text of 28 U.S.C. §§ 1404(a) and 1407(a) by denying Lexecon's motion to return the case to the JPML and granting Milberg Weiss' motion to transfer the case permanently to the District of Arizona. In making this argument, the dissent conveniently ignores the text of JPML Rule 14(b), which clearly interprets section 1404(a) to authorize the transferee judge to transfer the case to the transferee district. The dissent also conveniently ignores the text of 28 U.S.C. § 1407(f), which explicitly grants the JPML broad authority to "prescribe rules," such as Rule 14(b), as long as those rules are "not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure." 28 U.S.C. § 1407(f).

Implicit in the dissent's argument, then, is a claim that Rule 14(b) is inconsistent with sections 1404(a) and 1407(a). The dissent is far too quick to accuse the JPML of violating the statute that created it. It is useful to recall that the JPML consists of "seven circuit and district judges designated from time to time by the Chief Justice of the United States." 28 U.S.C. § 1407(d). Respect for our brethren, and their longstanding practice, requires us to presume, absent compelling evidence to the contrary, that the rules promulgated pursuant to section 1407(f) are "not inconsistent with Acts of Congress." The alleged inconsistencies cited by the dissent are not sufficiently glaring to overcome that presumption. Hence, we conclude that Rule 14(b) is a valid exercise of the JPML's rulemaking authority, and that Judge Roll's actions in this case were fully justified.

proposed statute; that report stated that the bill "affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes." H.Rep. No. 1130, 90th Cong., 2d Sess. 3, *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900. The report continued, *id.* at 1901-02:

> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings. The experience of the Coordinating Committee [for Multiple Litigation of the U.S. District Courts, established by the Judicial Conference of the United States] was limited to pretrial matters, and the committee consequently considers it desirable to keep this legislative proposal within the confines of that experience. . . . Of course, 28 U.S.C. 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable.

Thus, Congress, because of the nation's limited experience with multidistrict litigation, sought to design only the powers and duties of its new creation, the JPML. Despite some uncertainty about this matter initially, the power of the transferee court to transfer a case to itself for trial has been reinforced by its consistent recognition in practice. Recourse to such sustained practice, particularly when approved by the JPML, is a legitimate aid to statutory interpretation. *See United States v. American Trucking Ass'n*, 310 U.S. 534, 549, 60 S.Ct. 1059, 1067, 84 L.Ed. 1345 (1940). In the case before us, this reading also strongly promotes judicial efficiency, which was a primary purpose of the legislation that created the JPML. *See* H.Rep. at 2, 1968 U.S.C.C.A.N. at 1899.

B. *The Procedures Available to Initiate Remand*

Additional insight into the apparently mandatory language of 28 U.S.C. § 1407(a) is provided by JPML Rule 14(c). That rule imposes the duty on the JPML to:

> consider remand of each transferred action . . . at or before the conclusion of coordinated or consolidated pretrial proceedings on (i) motion of any party, (ii) suggestion of the transferee district court, or (iii) the Panel's own initiative[.]

The absence of any such "motion" by a party, "suggestion" by the transferee court, or "initiative" of the Panel appears to leave the case in the care of the transferee court. Under these circumstances the transferee court must complete the litigation, even if it involves a trial, to avoid the absurdity of indefinitely suspended litigation, the pretrial proceedings of which have come to a close. Therefore, where the transferee court has declined to suggest a remand, the JPML has not ordered a remand on its own initiative, and the litigant has failed to seek a remand before the JPML, the transferee court is entitled to terminate the proceedings by conducting the trial. Besides setting out a procedure by which the JPML's duty to remand is triggered, this rule thus gives effect to the final clause of section 1407(a) by rendering its mandatory clause inoperative where the action has been terminated, even by trial.

That is the precise position in which the case rests in this appeal. The JPML's duty to remand was not activated. To repeat, the trigger to such activation was never pulled. Neither the district court nor the JPML sought to remand the case. Moreover, Lexecon, in lieu of moving the JPML for a remand, brought its motion before the district court, and now appeals to us for a remedy. Neither this procedure, nor its earlier petition for a writ of mandamus, amounts to a motion for remand brought before the JPML. Lexecon failed to seek succor from the

one source that easily could have granted it if it so chose.[8] The district court, therefore, properly proceeded to conduct a trial on the single remaining defamation claim, following the completion of the pretrial proceedings.

C. *Propriety of the Section 1404(a) Transfer*

Besides arguing that the district court's transfer to itself was without authority by virtue of section 1407, Lexecon also argues that it was improper under section 1404(a). Lexecon argues that any incremental gain in efficiency was at its expense, and that it was prejudiced by being dragged from Chicago, Illinois, to Arizona and forced to appear before Judge Roll, who was unfamiliar with MDL 834 and who improperly proceeded to "dismantle" its case. We disagree.

Lexecon, to put it gently, was no stranger to the District of Arizona; its participation in MDL 834 precludes any such claim. Moreover, Judge Roll had become quite familiar with the case by the time of his decision to transfer the trial of the defamation claim to his own district. Finally, Judge Roll's dismissal of most of Lexecon's claims is not a ground for showing prejudice.

After a careful examination of the record and consideration of the arguments, we find no reason to question the district court's authority to try Lexecon's defamation claim in the District of Arizona, or the fairness of doing so.

---

[8] The dissent argues that Lexecon should not be faulted for its failure to move the JPML for remand, because Lexecon knew that the JPML would probably have denied the motion. Even assuming that Lexecon's prospects for success were slim, the fact remains that Rule 14(c) gave Lexecon the option to present its case to the JPML, including the arguments advanced by Judge Kozinski in his dissent. Lexecon chose not to pursue that option. In making this choice, Lexecon also knew, or should have known, that the option would expire, pursuant to Rule 14(b), if and when Judge Roll decided to transfer the case permanently to the District of Arizona.

III.

THE DENIAL OF INJUNCTIVE RELIEF SOUGHT BY MILBERG WEISS

No. 95-15759

After final judgment was entered in MDL 834 and Lexecon renewed its motion for a suggestion of remand, Milberg Weiss sought injunctive relief on the ground that the final judgment was res judicata as to Lexecon's claims. Milberg Weiss requested:

> (1) an order preliminarily enjoining plaintiffs . . . from prosecuting or otherwise pursuing against the Milberg Defendants, in any other judicial district or forum, any claims or other matters that were raised or could have been raised in the *Lincoln Savings* action . . .; and (2) an order permanently enjoining plaintiffs from prosecuting or otherwise pursuing those claims or other matters in any court or forum.

The district court concluded that Lexecon's claims were not precluded, and denied the motion.

We must uphold the denial of injunctive relief "unless the court incorrectly applied the law, relied on clearly erroneous factual findings, or otherwise abused its discretion." *Contract Serv. Network, Inc. v. Aubry*, 62 F.3d 294, 297 (9th Cir.1995). We review de novo issues of law underlying the denial, including the determination that Lexecon's claims were not barred by res judicata. *Id.* We now affirm.

A. *Mootness*

Initially, we confront the issue raised by Lexecon of the mootness of this appeal.[9] An appeal is moot "when

---

[9] Lexecon also argues that the denial was not an appealable interlocutory order under 28 U.S.C. § 1292(a)(1). This is irrelevant given that final judgment has since been entered. *See In re Jenson,*

events occur which prevent the appellate court from granting any effective relief even if the dispute is decided in favor of the appellant." *Holloway v. United States*, 789 F.2d 1372, 1373 (9th Cir.1986) (internal quotation omitted). To the extent that Milberg Weiss sought to have the district court enjoin the litigation before the district court, which thereafter was completed favorably to Milberg Weiss by the entry of final judgment, its appeal from the court's failure to do so is moot. However, mootness does not extend to the efforts of Milberg Weiss to enjoin Lexecon from prosecuting its claims in other courts.

B. *Res Judicata*

Milberg Weiss supports its effort to enjoin Lexecon by arguing that the MDL 834 litigation foreclosed Lexecon's claims by reason of res judicata. This considerably overstates the preclusive effect of Judge Bilby's actions.

Under the doctrine of res judicata, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427-28, 69 L.Ed.2d 103 (1981). Judge Bilby's action pertaining to Lexecon was to dismiss the claims of the class against Lexecon without prejudice, in accordance with the parties' resolution. We have held that a dismissal without prejudice lacks res judicata effect. *In re Corey*, 892 F.2d 829, 835 (9th Cir.1989), *cert. denied*, 498 U.S. 815, 111 S.Ct. 56, 112 L.Ed.2d 31 (1990). Nor was Judge Bilby's subsequent order of December 31, 1992 (*see supra* n. 2), a judgment on the merits of the claims against Lexecon. That order merely clarified the terms of the resolution, indeed emphasized that there had been no judgment on the merits of the claims against Lexecon.

980 F.2d 1254, 1258 (9th Cir.1992) (upon entry of final judgment, interlocutory orders become appealable). We decline to discuss Lexecon's several additional arguments concerning procedural irregularities in Milberg Weiss' appeal, which are without merit.

Lexecon's reliance on *Western Sys., Inc. v. Ulloa*, 958 F.2d 864 (9th Cir.1992), *cert. denied*, 506 U.S. 1050, 113 S.Ct. 970, 122 L.Ed.2d 125 (1993), and *Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425 (9th Cir.1986), is therefore misplaced. Those cases develop the relitigation exception to the Anti-Injunction Act, which allows a district court to enjoin litigation in other courts if such litigation is barred by res judicata.[10] Because Lexecon's claims are not barred by res judicata, those cases are not controlling.

C. *The Requirements for Injunctive Relief*

Even if Lexecon's claims were barred by res judicata, Milberg Weiss has still failed to show that the district court abused its discretion in declining to grant injunctive relief. To obtain a preliminary injunction, a party must show either "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) the existence of serious questions going to the merits and the balance of hardships tipping in the movant's favor." *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir.1993) (internal quotation omitted), *cert. dismissed*, 510 U.S. 1033, 114 S.Ct. 671, 126 L.Ed.2d 640 (1994). At the time the Milberg Weiss motion was filed, no such showing could be made. At that time, February 6, 1995, Milberg Weiss had also moved for a permanent transfer of this case to the Arizona District, and Judge Roll was poised to rule on Lexecon's motion to refer the case to the JPML for remand. His rulings thereafter were generally favorable to Milberg Weiss. Even had these rulings been adverse to Milberg Weiss, it could have appealed them to this court; therefore, it could not show either the possibility of irreparable injury or that the balance of

[10] *See* 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."); *Western Sys.*, 958 F.2d at 871; *Golden*, 786 F.2d at 1427.

hardships tipped in its favor. *See United States v. Rohm & Haas Co.*, 721 F.Supp. 666, 699 (D.N.J.1989) (refusing to enjoin itself from entering proposed consent decree where appealability of the decree defeated any claim of irreparable harm). Nor was there any indication that Lexecon was likely to initiate an entirely new lawsuit on the same claims in a different forum. In short, Milberg Weiss failed to establish the conditions prerequisite to the issuance of the preliminary and permanent injunctions it sought.[11]

IV.

THE DISMISSAL OF THE MALICIOUS PROSECUTION AND ABUSE OF PROCESS CLAIMS

Nos. 95-16595 and 95-16403

We now turn to Lexecon's appeal from the dismissal by the district court under Fed.R.Civ.P. 12(b)(6) of its malicious prosecution and abuse of process claims. Our review of this dismissal is de novo, with all factual allegations taken as true and construed in the light most favorable to Lexecon. *See Gotcher v. Wood*, 66 F.3d 1097, 1099 (9th Cir.1995), *petition for cert. filed*, 64 U.S.L.W. 3605 (1996). The district court's denial of Lexecon's motion for leave to amend its complaint is reviewed for an abuse of discretion. *United States v. County of San Diego*, 53 F.3d 965, 969 n. 6 (9th Cir.1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 183, 133 L.Ed.2d 121 (1995).

---

[11] Lexecon requests attorneys' fees for a frivolous appeal under Fed.R.App.P. 38. However, Rule 38, as amended effective December 1, 1994, requires that any such request be made by a separately filed motion. Without commenting on the merits of its request, we therefore deny Lexecon's request without prejudice to its filing a separate motion for attorneys' fees.

A. *Malicious Prosecution*

Under Arizona law, which the parties no longer dispute is the applicable law, the plaintiff must allege, and to prevail must ultimately prove, that the defendant "(1) instituted a civil action which was (2) motivated by malice, (3) begun without probable cause, (4) terminated in plaintiff's favor and (5) damaged plaintiff." *Bradshaw v. State Farm Mut. Auto Ins. Co.*, 157 Ariz. 411, 758 P.2d 1313, 1319 (1988). Under Arizona law, probable cause requires that the plaintiff honestly believe in the lawsuit's possible merits and that the belief be objectively reasonable. *Id.* (citing Restatement (2d) of Torts § 675 comment c; Prosser & Keeton on the Law of Torts § 120, at 893 (5th ed. 1984)).

There is no dispute here that Lexecon has properly alleged the first and last elements of the cause of action. Assuming, for purposes of argument only, that Lexecon has sufficiently alleged lack of probable cause and malice as well, its claim fails nonetheless. Judge Bilby's rulings in MDL 834, including his order of December 31, 1992 (*see supra* n. 2), plainly indicate that the litigation was not "terminated" in Lexecon's favor.

Lexecon attempts to avoid this roadblock to its malicious prosecution claim by insisting that the district court erred in examining the MDL 834 record in ruling on Milberg Weiss' 12(b)(6) motion.[12] In general, material outside the pleadings cannot be considered in ruling on a motion to dismiss, unless the motion is treated as one for summary judgment and the parties are "given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12(b); *Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1496

---

[12] *See, e.g., In re American Continental*, 845 F.Supp. at 1385. ("The record before this Court as recited in the *Shields* rulings is highly persuasive evidence that the case against Lexecon meets the probable cause threshold.").

(9th Cir.1995). Nonetheless, ample authority exists which recognizes that matters of public record, including court records in related or underlying cases which have a direct relation to the matters at issue, may be looked to when ruling on a 12(b)(6) motion to dismiss. *See Shaw v. Hahn*, 56 F.3d 1128, 1129 n. 1 (9th Cir.1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 418, 133 L.Ed.2d 336 (1995); *Henson v. CSC Credit Serv.*, 29 F.3d 280, 284 (7th Cir.1994); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.1992).

It would be absurdly formal to hold that Judge Bilby's published opinion in MDL 834 and his December 31, 1992, order must be ignored in ruling on a motion to dismiss Lexecon's malicious prosecution claim. Only by alleging its own involvement as a defendant in MDL 834 was Lexecon able to frame its claim of malicious prosecution; why should the district court be limited by Lexecon's selective telling of a story that unfolded, and was duly recorded, in its sister court? Milberg Weiss, in its motion to dismiss, was entitled to refer to the record and outcome of the MDL litigation, and the district court was entitled to do the same in assessing the viability of Lexecon's claim. Formalism has its place, but that place is not here.

Lexecon argues further that the record in MDL 834 supports its contention that the litigation terminated in its favor. This is not true. "A termination does not satisfy the [favorable termination] element [of a malicious prosecution claim] if it is the result of compromise or settlement of the claim." *Frey v. Stoneman*, 150 Ariz. 106, 722 P.2d 274, 277 (1986) (en banc). "If entry of summary judgment was merely the formal means of securing the parties' settlement benefits, the judgment cannot form the basis for a malicious prosecution action." *Id.* 722 P.2d at 278-79 (internal quotation omitted). Here, the avoidance of the use of the term "settlement" in favor of the alternative "resolution" does not alter that result.

Lexecon urges us to rely on *Bradshaw*, 758 P.2d at 1321, which held that a settlement may be a favorable termination depending on the surrounding facts. Lexecon argues that favorable termination is a question of fact that cannot be resolved on a 12(b)(6) motion. We disagree. In *Bradshaw*, the settlement terms called for the plaintiff to withdraw its action, pay the defendants $60,000, and stipulate to a dismissal with prejudice. Here, it was the defendant Lexecon that paid $700,000 in exchange for its dismissal from MDL 834. No additional factual development is necessary. The circumstances of this case do not indicate that the MDL 834 litigation against Lexecon terminated in its favor. It follows that Lexecon's malicious prosecution claim against both Milberg Weiss and Cotchett fails.

It also follows that we need not consider the argument of Milberg Weiss that the tort of malicious prosecution has been reshaped by First Amendment principles developed in the *Noerr-Pennington* doctrine [13] and *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 54-56, 113 S.Ct. 1920, 1925, 123 L.Ed.2d 611 (1993) ("*PREI*"). Milberg Weiss argues that these decisions have raised the threshold for access to a malicious prosecution claim by requiring the plaintiff to show that the defendant's earlier suit was "objectively baseless" and one in which "no reasonable litigant could realistically expect success on the merits." [14] This formu-

---

[13] *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).

[14] The district court did dismiss the malicious prosecution claim on this ground, concluding that Lexecon could not show that the class' claims against it in MDL 834 were objectively baseless as required by *PREI*. However, we may affirm the dismissal on any basis supported by the record. *Pentax Corp. v. Myhra*, 72 F.3d 708, 710 (9th Cir.1995).

lation, if applied, would alter the meaning under Arizona law of the "probable cause" element, and to some degree the "malice" element, by eliminating the subjective, honest belief requirement.

Noerr-Pennington and *PREI* were federal antitrust cases that did not address the state law tort of malicious prosecution. In this circuit, the application of this line of cases to state law claims has been unpredictable. For example, the *PREI* objective baselessness standard was not applied to a National Labor Relations Board decision that a libel suit brought by an employer against a union was an unfair labor practice. *PREI* was said not to be on point. *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1087-88 (9th Cir.1995). On the other hand, a timber company counterclaim against an environmental organization for abuse of process, based on that organization's efforts to enjoin logging on the timber company's land, was required to meet the heightened pleading standard associated with *Noerr-Pennington*. *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533-35 (9th Cir.1991).

The rationalizing principle of these cases is unclear, unless it rests on a judicial preference for certain types of litigation that appear to promote specifically recognized public interests. To encourage vigilant pursuit of these interests, it may be thought proper to protect them against threats of malicious prosecution by raising the barrier to access to that remedial tort action. Milberg Weiss argues, in substance if not in form, that the class action on behalf of Lincoln Savings investors easily conforms to that rationalization. Innocent investors in improperly operated savings and loan institutions and their legal representatives are as deserving of protection from the threat of malicious prosecution by those who have rendered financial services to such institutions as are plaintiffs in antitrust or environmental proceedings.

While there is a certain appeal in such an approach, we decline to rest our rejection of Lexecon's malicious prosecution on this ground.[15] We hold only that the MDL 834 litigation against Lexecon was not terminated in its favor. Therefore, under Arizona law, Lexecon has failed to state a claim of malicious prosecution.

B. *Abuse of Process*

Abuse of process is described by the Restatement (Second) of Torts § 682 (1977) as follows:

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

This definition is accepted by the Arizona courts. *See Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876, 881

---

[15] There is now extensive case law on both sides of the question whether the *Noerr-Pennington* doctrine brings first amendment principles to bear on state law tort claims. *See, e.g., State of South Dakota v. Kansas City Southern Indus.*, 880 F.2d 40, 50-51 (8th Cir.1989) (applying first amendment analysis to a state claim for tortious interference with contractual relations), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 726, 107 L.Ed.2d 745 (1990); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir.1988) (applying defamation and *Noerr-Pennington* analyses to tort claim based on defendants' actions in alerting authorities to plaintiff's violations of law); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir.1983) (applying *Noerr-Pennington* and its sham litigation exception "to protect the First Amendment right to petition against claims of tortious interference with business relationships"); *Sierra Club v. Butz*, 349 F.Supp. 934, 938-39 (N.D. Cal.1972) (applying first amendment analyses of *Noerr-Pennington* and defamation cases to state counterclaim for interference with advantageous relationship); *Florida Fern Growers, Inc. v. Concerned Citizens of Putnam County*, 616 So.2d 562, 569 (Fla.1993) (declining to follow *Sierra Club v. Butz*). The time may come when this circuit must speak definitively on the question. However, this is not the right time, or the right case, in which to do so.

(App.1982); *Morn v. City of Phoenix*, 152 Ariz. 164, 730 P.2d 873, 875 (App.1986). Plaintiff must show that defendants (1) committed a willful act in the use of judicial process (2) for an improper ulterior purpose. *Nienstedt*, 651 P.2d at 881.

The gravamen of the tort is not "the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." Restatement § 682, comment a; *see also Morn*, 730 P.2d at 875.

Accordingly, the task of this court is to determine whether the addition of Lexecon as a defendant in the MDL 834 litigation had as its primary purpose an objective for which that litigation was not intended. We hold that no such objective existed in MDL 834.

It is clear that the primary purpose of the MDL 834 litigation was to recover from the collapse of American Continental/Lincoln Savings on behalf of the investors therein such assets as was possible under the law. Lexecon, of course, does not deny that. Rather, its focus is upon its inclusion as a defendant. It asserts that class counsel's primary purpose is attempting to add Lexecon and Fischel as defendants was "(1) to extract false testimony implicating other *Shields* defendants, (2) to prevent Arthur Young & Co. from using Lexecon as an expert in *Shields*, and (3) 'to make Lexecon . . . far less attractive to potential clients as expert witnesses.'" *In re American Continental*, 845 F.Supp. at 1382.

Lexecon alleges that after Milberg Weiss sought to file a fifth amended complaint adding both Lexecon and Fischel as defendants, it offered to dismiss the motion in exchange for "false testimony" against existing defendants. Lexecon refused, and leave to file this fifth amended complaint was subsequently denied. The alleged attempt to extract false testimony therefore never amounted to anything. Although process did later issue against Lexecon only as a result of defendants' successful motion to file their sixth amended complaint, the attempt to coerce false testimony was not repeated. Therefore, Lexecon cannot show that the primary purpose behind Milberg Weiss' use of process was to coerce false testimony.

Lexecon also points to additional acts of Milberg Weiss that it claims amounted to an abuse of process. Some of these acts, such as the unsuccessful motion to file the fifth amended complaint, occurred "pre-process," and were therefore not actionable.[16] Others were collateral to the MDL 834 litigation, such as Milberg Weiss attorneys' use of that litigation to impeach Lexecon expert witnesses during cross-examination in separate and distinct litigation. Such cross-examination, so long as it conformed to the terms of the MDL 834 resolution, was not improper and therefore cannot form the basis of an abuse of process claim.

The acts alleged by Lexecon did not have as their *primary purpose* to inflict harm on Lexecon or Fischel. Nor did the addition of Lexecon as an MDL 834 defendant to assert that Lexecon bore some responsibility for those investors' losses constitute an abuse of process. Lexecon's abuse of process claim was therefore properly dismissed.[17]

---

[16] Although Arizona courts define "process" broadly, *Nienstedt*, 651 P.2d at 880, we agree with the district court that it is not read so broadly as to include a failed attempt to sue in which process never issued.

[17] Examination of Lexecon's proposed second amended complaint shows that it merely reiterates the same claims in new language. Because leave to amend is inappropriate where the amendment does not solve the legal deficiencies in the complaint, the district court did not abuse its discretion in denying Lexecon's motion for leave to amend. *See Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990).

V.

THE DISMISSAL OF MILBERG WEISS' COUNTERCLAIMS

No. 95-16754

The Milberg Weiss counterclaims alleged fraud, breach of contract, unjust enrichment, and promissory estoppel. The alleged source of these claims is the negotiations that led to the resolution of Lexecon's exposure to liability in MDL 834. We review their dismissal de novo. *Gotcher*, 66 F.3d at 1099; *Barrus v. Sylvania*, 55 F.3d 468, 469 (9th Cir.1995).

First, Milberg Weiss alleged that while Lexecon said it was negotiating the "resolution" to avoid damaging cross-examination about MDL 834 in future cases, its true reason was to preserve its ability to sue class counsel for malicious prosecution by avoiding an unfavorable jury verdict. The district court properly dismissed this claim. While Milberg Weiss is a party in the litigation now before this court, it was not a party in the MDL 834 litigation; rather, it was a counsel to the class on whose behalf the proceedings against Lexecon were brought. As the district court put it: "Whatever harm resulting from the resolution was sustained by the class, not by class counsel." *In re American Continental*, 884 F.Supp. at 1397.

Second, Milberg Weiss argues that during the negotiations, Lexecon represented that it had no applicable insurance when in fact it did have such insurance, and that it relied on that representation in agreeing to the resolution. The district court properly ignored this claim because Milberg Weiss failed either to raise the issue in its pleadings, or to request leave to amend. *See* Fed.R.Civ.P. 15(a).

VI.

CONCLUSION

The judgments in Nos. 95-15759, 95-16403, 95-16595, and 95-16754 are affirmed.

KOZINSKI, Circuit Judge, dissenting.

Since the Judicial Panel on Multidistrict Litigation (JPML) was created in 1968, it has transferred 92,562 cases for consolidated pretrial proceedings. Only 3,508 of these—less than four percent—have been sent back for trial in the district where the complaint was filed. Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1995 Report of the Director* 32. Yet the statute which authorizes the JPML to transfer cases for coordinated or consolidated pretrial proceedings commands that "[e]ach action so transferred shall be remanded by the [JPML] at or before the conclusion of such pretrial proceedings to the district from which it was transferred. . . ." 28 U.S.C. § 1407(a). These numbers tell the story of a remarkable power grab by federal judges who have parlayed a narrow grant of authority to conduct consolidated discovery into a mechanism for systematically denying plaintiffs the right to trial in their forum of choice.

You don't have to stare very long at the statutory language and drafting history to realize this is not at all what Congress had in mind when it passed 28 U.S.C. § 1407. The language itself is clear as sunlight: A case may be transferred in order to take advantage of consolidated or coordinated discovery with other cases having a common factual nucleus. Coordinated or consolidated pretrial proceedings are to be handled by the transferee court but, if the case is to be tried, it must go back from whence it came.

The legislative history—if such limpid prose needs elucidation—is perfectly consistent with the text. Congress made a deliberate choice to authorize transfer for pretrial purposes only: "[T]he bill provides for the transfer of venue of an action for the limited purpose of conducting coordinated pretrial proceedings." H.Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900. Congress thought about authorizing the JPML to

transfer cases for all purposes but decided not to: "The bill does not, therefore, include the trial of cases in the consolidated proceedings." *Id.* at 1901. Congress promised to return to the issue if it found the current grant of authority insufficient: "If . . . further experience justifies extending [section 1407] to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary." *Id.* at 1902. Congress has never made those amendments.

Soon after the MDL process got underway, a peculiar thing started happening: Judges began to develop proprietary feelings toward the cases entrusted to them; they began using 28 U.S.C. § 1404(a), the venue transfer statute, to hold on to these cases for trial. Some judges worried that such transfers were not authorized: "I must recognize candidly," wrote Judge Bownes, then of the District of New Hampshire, "that there is nothing in the language of 28 U.S.C. § 1407(a) or 1404(a) which directly allows, or even suggests, that the transferee judge has the power to transfer cases to his district, or any district, for purposes of trial." *In re Air Crash Disaster Near Hanover, New Hampshire*, 342 F.Supp. 907, 909 (D.N.H.1971). Such scruples were cast aside after the Second Circuit's opinion in *Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir.1971), a case that proved unusually influential, perhaps because retired Associate Justice Tom Clark was a member of the two-judge panel that authored the opinion.

Since *Pfizer*, this practice (known as "self-transfer") has become a routine aspect of the MDL process. The JPML has blessed self-transfer by its Rule 14(b), which provides that the Panel will not send a case back for trial if the district court handling pretrial matters transfers the case to itself, and by caselaw holding that the JPML will not even consider remanding so long as the district court is considering a self-transfer motion. *See In re CBS Color Tube Patent Litig.*, 342 F.Supp. 1403, 1405 (J.P.M.L. 1972) ("In view of the pendency of [a § 1404(a)] motion, we expressly refrain from granting this motion for remand and interfering in matters within the discretion of the transferee judge.").[1]

The majority thus has ample company in holding that a district judge to whom a case has been sent for pretrial under section 1407(a) may latch onto it by ordering a section 1404(a) self-transfer. *See* maj. op. at 1532. Every court that has examined the issue since *Pfizer* has held or assumed that such authority exists.[2] But a close

[1] It is for this reason that the majority's suggestion that Lexecon somehow waived its right to seek return of the case to the Northern District of Illinois is ill founded. *See* maj. op. at 1533-34. Under the Panel's rules and precedent, the JPML will not normally consider a transfer without a recommendation from the district judge. *See, e.g.*, J.P.M.L.R.Proc. 14(d) ("The Panel is reluctant to order remand absent a suggestion of remand from the transferee district court."); *In re A.H. Robbins Co.*, 453 F.Supp. 108, 110 (J.P.M.L. 1978); *In re Holiday Magic Securities & Antitrust Litig.*, 433 F.Supp. 1125, 1126 (J.P.M.L. 1977) (both noting that, absent a suggestion from the transferee court, a party seeking remand from the JPML bears a heavy burden of persuasion). Lexecon—in compliance with this authority—petitioned the district court in August 1994 to refer the case back to the JPML because all possible coordinated discovery had concluded. The district court stayed consideration of this motion pending the end of discovery. Lexecon renewed its remand request at the close of discovery in November 1994. In December 1994, defendants moved for a section 1404(a) transfer, and in March 1995, the district court granted the transfer to itself, while simultaneously denying Lexecon's remand request.

Lexecon surely cannot be faulted for following the JPML rules by petitioning the district court twice for a referral and awaiting its ruling. And, by the time the court denied the motion, it had transferred the case to itself, which made the case off limits for further action by the Panel. *See* J.P.M.L.R.Proc. 14(b). The majority's charge that Lexecon—which went so far as to seek a writ of mandamus from our court—"failed to seek succor" for its wrongs, maj. op. at 1534, is a sucker-punch.

[2] *See* maj. op. at 1532 & n. 3 (citing *In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d 528, 532 n. 7 (4th Cir.1996);

look at this caselaw reveals a remarkable lack of critical attention to this issue, with almost every court relying on *Pfizer* as the sum and substance of its analysis.[3] In fact, *Pfizer*, with its one page of analysis, is the only court of

Washington Pub. Util. Group v. United States Dist. Ct., 843 F.2d 319, 326 (9th Cir.1987); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1178 (D.C.Cir.1987), *aff'd*, 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989); *Kohr v. Allegheny Airlines*, 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied*, 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975); *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F.Supp. 330, 332 (N.D.Ill.1990); *In re Air Crash Disaster Near Chicago*, 476 F.Supp. 445, 450 (J.P.M.L.1979); *In re CBS Color Tube*, 342 F.Supp. at 1404-05).

[3] *See, e.g., Washington Pub. Util. Group*, 843 F.2d at 326; *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d at 1178 n. 7; *In re Fine Paper Antitrust Litigation*, 685 F.2d at 820 n. 7; *Eastern Air Lines, Inc. (In re Air Crash Disaster at Florida Everglades on Dec. 29, 1972)*, 549 F.2d at 1009 n.4; *In re Air Crash Disaster at Detroit Met. Airport on Aug. 16, 1987*, 737 F.Supp. 391, 394 n. 4 (E.D.Mich.1989); *In re Tax Refund Litig.*, 723 F.Supp. 922, 924 (E.D.N.Y.1989); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987*, 720 F.Supp. 1455, 1458 (D.Colo.1988); *In re Dow Co. "Sarabond Products" Liab. Litig.*, 664 F.Supp. 1403, 1403-04 (D.Colo.1987); *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 479 F.Supp. 1118, 1122-23 (E.D.N.Y.1978); *In re Air Crash Disaster Near Chicago*, 476 F.Supp. at 450; *In re Anthracite Coal Antitrust Litig.*, 436 F.Supp. 402, 403-04 (J.P.M.L.1977); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 424 F.Supp. 504, 507 (J.P.M.L.1976); *In re Bomb Disaster at Roseville, Cal., on April 28, 1973*, 399 F.Supp. 1400, 1403 (J.P.M.L.1975); *In re Caesars Palace Securities Litig.*, 360 F.Supp. 366, 374 (S.D.N.Y. 1973); *In re Aircrash Near Duarte, Cal., on June 6, 1971*, 357 F.Supp. 1013, 1015 (C.D.Cal.1973); *In re CBS Color Tube Patent Litig.*, 342 F.Supp. at 1405 n. 2; *In re Air Crash Disaster at Huntington, W. Va., on Nov. 14, 1970*, 342 F.Supp. 1400, 1403 n. 4 (J.P.M.L.1972); *Greyhound Computer Corp. v. I.B.M. Corp.*, 342 F.Supp. 1143, 1145 (D.Minn.1972); *In re Viatron Computer Systems Corp. Litig.*, 86 F.R.D. 431, 432-33 (D.Mass.1980); *In re Master Key Antitrust Litig.*, 70 F.R.D. 23, 28 (D.Conn.1975); *In re Penn Central Commercial Paper Litig.*, 62 F.R.D. 341, 345 (S.D.N.Y. 1974), *aff'd*, 515 F.2d 505 (2d Cir.1975) (all relying on *Pfizer*).

appeals opinion that seriously addresses the issue; most merely *refer* to the practice on the way to tackling other questions.[4] A lot of cases thus seem to sanction the practice, but not a single case after *Pfizer* has taken an independent look at the issue or dealt with the difficult questions it raises.

[4] *In re Korean Air Lines Disaster of Sept. 1, 1983* dealt with whether the *Van Dusen* rule—that the state law applicable in the transferor forum attends the transfer—should apply to transferred federal claims. *See* 829 F.2d at 1174. Although Judge Douglas Ginsburg in his concurrence does mention the self-transfer practice, *see id.* at 1178 (D.H. Ginsburg, J., concurring), Judge Ruth Bader Ginsburg writing for the court describes section 1407(a) as "a statute authorizing transfers only for pretrial purposes." *Id.* at 1174. The Fourth Circuit also made passing reference to this practice in a footnote, *see In re Food Lion, Inc., Fair Labor Standards Act Litig.*, 73 F.3d at 532 n. 7, on its way to addressing the issue in that case—when parties may appeal dispositions in the transferee court. Significantly, the Fourth Circuit noted, "Although Congress has not yet seen fit to allow the Panel or the transferee court to consolidate cases for trial, this is possibly a next step." *Id.* at 532. Our circuit and the Fifth have also noted the practice, but declined to address its legitimacy because the parties hadn't raised the issue. *See Washington Pub. Util. Group v. United States Dist. Ct.*, 843 F.2d 319 at 326 (the parties "disagree only as to whether the court properly applied [section 1404(a)]"); *Gordon v. Eastern Air Lines, Inc. (In re Air Crash Disaster at Florida Everglades on Dec. 29, 1972)*, 549 F.2d at 1009 n. 4 ("The parties have not raised the question whether [a court can transfer an MDL case to itself;] therefore we do not reach it."). The Seventh Circuit has twice reported that the practice exists when recapping the factual history of cases that dealt with issues unrelated to the self-transfer question. *See Eckstein v. Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), *cert. denied*, 510 U.S. 1073, 114 S.Ct. 883, 127 L.Ed.2d 78 (1994); *Kohr*, 504 F.2d at 402.

Only the Third Circuit has seemingly blessed this practice. *See In re Fine Paper Antitrust Litigation*, 685 F.2d at 810. But the Third Circuit, in the single paragraph it devotes to the subject, doesn't even mention the possible conflict with section 1407(a), effectively assuming that self-transfer in the MDL context is appropriate. *See id.* at 819-20. Moreover, the Third Circuit's analysis consists primarily of a block quote from, you guessed it, *Pfizer*. *See id.* at 820 n. 7.

While the federal courts have treated *Pfizer* as dispositive, commentators have been far more skeptical. With remarkable unanimity, they have questioned whether, and under what circumstances, district judges to whom cases are entrusted for purposes of discovery may hold on to them for trial. *See, e.g.*, 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3866, at 619 (2d ed. 1986) ("More questionable is the practice of the Section 1407 judge transferring the cases to himself for all purposes under Section 1404(a) of Title 28 . . . thereby giving the transferee court the ability to conduct the trial."); Robert H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 Cornell L.Rev. 779, 809 (1985) ("[I]t seems clear that the lower federal courts have done by judicial fiat what Congress refused to do by statute in 1969: amend section 1407 to allow transfers for trial."); Ross D. Cooper, *The Korean Air Disaster: Choice of Law in Federal Multidistrict Litigation*, 57 Geo.Wash.L.Rev. 1145, 1164 (1989) (similar); Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Public Policy?*, 23 Mem.St.U.L.Rev. 841, 866 (1993) ("It is a leap in logic to conclude that causes of action not terminated upon dispositive motions should be retained in the transferee court under the rubric of § 1404(a), when the statutory language of §1407 explicitly directs remand to the transferor court."); *Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC American Corp.*, 59 Antitrust L.J. 273, 302 (1990) ("[T]he use of Section 1404(a) transfers to consolidate multidistrict cases for trial is of dubious legal validity."); Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U.Penn.L. Rev. 711, 734 (1991) ("[A] transferee court's use of § 1404(a) sets Congress's carefully crafted plan for multi-

district litigation on its head."); Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 Fordham L.Rev. 41, 64 (1971) (the language and legislative history of section 1407(a) are so clear that it "originally appeared to be a futile exercise for a 1407 transferee court to rule on a 1404 transfer motion."); John F. Cooney, Comment, *The Experience of Transferee Courts Under the Multidistrict Litigation Act*, 39 U.Chi.L.Rev. 588, 606 (1972) ("[T]he apparently mandatory nature of the remand clause . . . implies that transferee courts lack this jurisdiction [to grant a section 1404 motion]."); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1102-03 (1987) ("[C]onsolidation for trial almost certainly defies both the letter of section 1407 and the intent of its drafters." (footnotes omitted)); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 Harv.L. Rev. 1001, 1030-31 (1974) (legislative history of section 1407 emphasizes it would be used only for pretrial proceedings).

Research discloses not a single commentator who has examined the question and found statutory support for the position taken by the federal courts. Seldom have courts and commentators diverged so widely in their treatment of a legal issue.

Self-transfer under section 1404(a), in fact, raises three tough legal questions. The first is whether a district judge to whom a case is transferred for "coordinated or consolidated pretrial proceedings" under section 1407 is authorized to pass on a section 1404(a) change of venue motion. The answer is not self-evident. A venue transfer motion is, to be sure, a pretrial motion and therefore arguably within the authority of the transferee court conducting "coordinated or consolidated pretrial proceedings." But there must be *some* pretrial motions MDL courts are not authorized to rule upon because section 1407(a) does not transfer the case for the conduct of all pretrial proceedings, only those that are "coordinated or consoli-

dated." The statutory language seems to limit the MDL court's authority to motions that implicate more than a single case—something that venue transfer motions, which call for an "individualized, case-by-case consideration of convenience," do not. *Van Dusen v. Barrack*, 376 U.S. 612, 622, 84 S.Ct. 805, 812, 11 L.Ed.2d 945 (1964); *see also Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S.Ct. 2239, 2243-44, 101 L.Ed.2d 22 (1988) ("A motion to transfer under § 1404(a) . . . calls on the district court to weigh in the balance a number of case-specific factors. . . .").[5]

The legislative history bears out this interpretation; Congress apparently understood the term "pretrial proceedings" to "generally involve deposition and discovery." H.Rep. No. 1130, *in* 1968 U.S.C.C.A.N. at 1900. A venue transfer motion is not a discovery motion. In fact, a proper application of section 1404(a) often depends on information obtained through discovery, so venue transfer motions are seldom considered before discovery closes. *See, e.g., In re Equity Funding Corp. of America Sec. Litig.*, 416 F.Supp. 161, 178-79 (C.D.Cal.1976); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 582 (1978); David F. Herr, *Multidistrict Litigation: Handling Cases Before the Judicial Panel on Multidistrict Litigation* 80 (1986); Robert J. Ward, *Multidistrict Litigation Procedures in the United States, in* The Trial Lawyer's Guide, at 249, 256 (John J. Kennelly ed. 1982) (all noting that transferee courts regularly postpone decisions on

[5] As I note below, shoehorning venue transfers into the concept of "coordinated or consolidated pretrial proceedings" requires a dramatic recalibration of the section 1404(a) calculus. *See* pp. 1546-49 *infra*. That MDL courts are unable to achieve consolidation for trial without twisting the standards of section 1404(a) beyond recognition ought to be a further clue that MDL courts have no business passing on venue transfer motions.

section 1404(a) motions until discovery is completed).[6] There is, therefore, a plausible case for holding that venue transfer motions are not among the powers of an MDL court.

And there is an excellent practical reason for so interpreting section 1407(a): If the MDL court grants a venue transfer motion, it cuts off the JPML's ability to comply with its statutory directive that it "shall" remand the case "to the district from which it was transferred." As one commentator noted, therefore, a change of venue motion "is of an entirely different nature than the powers" Congress intended to give MDL transferee courts. Trangsrud, 70 Cornell L.Rev. at 807.

It is true that an MDL court can dispose of the case by settlement or motion and thus prevent the JPML from remanding it.[7] But that is a possibility expressly accounted

[6] This was certainly the case here, as Judge Roll postponed deciding Lexecon's first change of venue motion (its initial remand request) until the end of discovery, at which time Milberg Weiss made its motion seeking self-transfer. Once discovery is completed, however, consolidated proceedings have ceased and there is no justification for allowing the transferee court to rule on the venue transfer motion; the motion could, just as easily, be ruled on by the originating district court after the case is remanded by the JPML.

Habitual procrastination of venue transfer decisions by MDL courts is ironic considering *Pfizer*'s big worry that, if the transferee court does not have authority to rule on a change of venue motion, no court would be able to do so during the course of pretrial proceedings. *See Pfizer*, 447 F.2d at 125 ("[T]o hold that the transferee court . . . has no section 1404(a) authority would mean that all proceedings on any section 1404(a) motion would have to be suspended for the entire period of pretrial. . . ."). This concern was especially misplaced because, so long as the case is partaking of "coordinated or consolidated pretrial proceedings" there is no need to transfer venue; indeed, any such transfer would defeat the purpose for which the case was consolidated in the first place.

[7] What kind of dispositive motions the MDL transferee court may rule on was once a subject of great controversy, but transferee courts, with the JPML's approval, now largely assume unlimited

for in section 1407(a), which releases the JPML from its obligation to transfer the case back to its originating district if "it shall have been previously terminated." 28 U.S.C. § 1407(a). Had Congress also meant to release the JPML from its obligation in cases where venue is changed pursuant to section 1404(a), it could have said so. In fact, Congress said quite the opposite, at least in the legislative history of section 1407(a), where it repeatedly noted that the new statute "would not affect the place of trial in any case," H.Rep. No. 1130, *in* 1968 U.S.C.C.A.N. at 1900, and that "trial in the originating district is generally preferable from the standpoint of the parties and witnesses." *Id.* at 1901; *see* Roberts, 23 Mem.St.U.L.Rev. at 868 ("Clearly, the exact legislative history specifies that Congress never intended § 1407 by itself or . . . [through] tandem use with § 1404(a) . . . to alter the venue of ultimate trial.").[8]

---

authority. *See* Levy, 40 Fordham L.Rev. at 60-61; *see also* Comment, *The Experience of Transferee Courts*, 39 U.Chi.L.Rev. at 588-89 ("After an initial period of hesitancy, transferee courts have steadily increased their control over pretrial proceedings far beyond the role envisioned by the drafters of the statute."). In fact, there is good reason to believe that Congress did not intend transferee courts to wield such unlimited authority. Had Congress wanted to authorize consolidated summary judgment procedures, it would have authorized the JPML to consolidate cases that presented common legal questions. Instead, Congress authorized consolidation only of cases that present "common questions of fact." Naturally, the JPML quickly ignored this limitation as well, and now routinely transfers cases where only common questions of law are at issue. *See, e.g.*, Levy, 40 Fordham L.Rev. at 48.

Whatever the *scope* of the MDL court's power to issue dispositive pretrial orders, the *duration* of that power cannot extend beyond the time when "coordinated or consolidated pretrial proceedings" come to an end. At that point, there's no further justification for keeping the case in the MDL process and hence no authority for the MDL transferee court to enter further orders.

[8] The majority takes comfort from passages of legislative history that in fact support my view. *See* maj. op at 1532-33. The first

It makes perfect sense for Congress to permit the transferee court to handle most pretrial legal issues—including some dispositive motions—and still insist that trial (if

---

passage quoted by the majority clearly says that venue transfer under section 1407(a) is for the "limited purpose of conducting coordinated pretrial proceedings" and that "[i]t would not affect the place of trial in any case." H.Rep. No. 1130, *in* 1968 U.S.C.C.A.N. at 1900. Presumably, the majority relies on the portion of the quote which states that section 1407(a) would not "exclude the possibility of transfer under other Federal statutes." *Id.* I don't see how this helps the majority a bit. The passage merely affirms that, while the MDL statute would provide a special mechanism for transferring cases for pretrial purposes, all other venue transfer provisions remain in effect once the MDL procedure ends and the case is remanded. It surely couldn't have meant that transferee courts have the power to keep cases for trial when the rest of the quote says just the contrary.

The majority's second block quote is no more helpful. Presumably, again, the majority intends to emphasize the portion of the quote which allows, "Of course, 28 U.S.C. § 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable." *Id.* at 1902. But the majority omits, by way of an ellipsis, the two sentences preceding this quote, which help put it in perspective:

> Additionally, trial in the originating district is generally preferable from the standpoint of the parties and witnesses, and from the standpoint of the courts it may be impracticable to have all cases in mass litigation tried in one district. Additionally, the committee recognizes that in most cases there will be a need for local discovery proceedings to supplement coordinated discovery proceedings, and that consequently remand to the originating district for this purpose will be desirable.

Id. Nor does the majority quote the sentence that immediately succeeds its quote: "If proposed section 1407 should be enacted and future experience justifies extending it to include consolidation and coordination for trial purposes as well, only minor amendments to the present language of the bill will be necessary." *Id.* Sandwiched between these provisions, which make it clear that Congress was not intending to authorize MDL transferee courts to keep the cases sent to them for coordinated discovery, the sentence referring to section 1404 could only have been intended as another acknowledg-

there be one) be conducted in the district where the complaint was filed. Trial is a unique part of the litigation process in that it involves fact-finding, usually by a jury. Congress may have felt that federal judges are fungible for purposes of resolving legal questions, but that jurors—who reflect the sense of the community in adjudicating the rights and liabilities of their neighbors—are not. Congress also may have been willing to deny plaintiffs control over the pretrial forum, but thought it unfair to deny them control over the place of trial because jurors in the transferee district may have "background[s] . . . so different from that of jurors in [the transferror district] as to deprive plaintiffs of their constitutionally guaranteed right to a trial by a jury of their peers." *In re Air Crash Disaster Near Hanover, New Hampshire*, 342 F.Supp. at 910.

Even assuming MDL transferee courts have authority to pass on ordinary venue motions, there is a second major question: May a court ever grant a motion to transfer venue *to itself?* Again, it helps to read the applicable statute, which in plain and simple terms provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any *other* district or division where it might have been

ment that the new MDL statute would not preclude normal venue transfers by the court where the case was originally filed.

In any event, vague allusions in the committee reports cannot override the clear statutory language of section 1407, which effectively forecloses venue transfers during the pendency of MDL procedures. This is precisely what one commentator who analyzed section 1407 before its enactment concluded: "[C]learly the [Coordinating C]ommittee's language [which was adopted into the House and Senate reports] is too ambiguous to provide any substantial justification for a court's reading section 1407 in a way opposed to its literal prohibition of transfers." Comment, *Consolidation of Pretrial Proceedings Under Proposed Section 1407 of the Judicial Code: Unanswered Questions of Transfer and Review*, 33 U.Chi.L.Rev. 558, 562 (1966). This commentator seems to have underestimated the creativity of federal judges.

brought." 28 U.S.C. § 1404(a) (emphasis added). I don't see how this language can be read to authorize a district court to transfer a case to itself. *See* Rhodes, 140 U.Penn.L.Rev. at 740 ("A transferee court using § 1404(a) is not transferring a case to *another* district. It is simply proclaiming trial jurisdiction over the case." (emphasis in original)). Indeed, the drafters of section 1404(a) could not possibly have meant to authorize self-transfers because that section long predates section 1407; the possibility that a district court would be in a position to transfer a case to itself was not something anyone at the time could have anticipated.[9] Thus, this is not a case where the statutory language imperfectly reflects the intention of the drafters. The language of section 1404(a) precisely matches the understanding of the Congress that enacted it.

Are the federal courts nevertheless justified in tweaking section 1404(a) to make it yield up an authorization for self-transfer in the MDL context? Even under the best circumstances such judicial legerdemain would be awk-

[9] Defendants make a Rube Goldberg argument that Lexecon's case was, in fact, transferred to *another* district: Although transferred temporarily for pretrial purposes, the case was still technically pending in the Northern District of Illinois when the section 1404(a) transfer moved it to the District of Arizona, an "other district . . . where it might have been brought." *See* Br. of Milberg Defendants and of Cross-Appellant Milberg Weiss, at 25. Defendants seem to think that section 1404(a) merely requires that a case be transferred from one court to another.

This argument makes no linguistic sense because section 1404(a) provides that *"a district court* may transfer any civil action to any *other* district . . ." 28 U.S.C. § 1404(a) (emphasis added). The phrase "any other district," which specifies the receiving court, stands in contrast to the earlier phrase "a district court," which refers to the court making the transfer. Or, to put it differently, the term "other district" must relate back to the term "district" within the same sentence. Thus, the court making the transfer cannot, under the terms of section 1404(a), be the same as the court receiving the transfer.

ward because it would require us to ignore the term "other" in section 1404(a). But these are not ideal circumstances because such manipulation creates a power that Congress considered giving federal courts but expressly *rejected*. *See* p. 1540 *supra*.

This, then, is not a case where Congress passed two laws at different times and forgot to harmonize them. Congress, rather, made a deliberate choice to leave trial of cases subject to the MDL process in the district where they were filed. Given section 1407(a)'s explicit command that cases be remanded for trial in the district where they were filed, and legislative history making it clear that this was a deliberate choice, I don't see how we can possibly fudge section 1404(a) to make it authorize self-transfer.

This question was not raised in *Pfizer* and no other federal court of appeals has ever considered it. The issue has been noted by commentators, and they have all concluded that self-transfer is not authorized by section 1404(a). *See, e.g.*, Rhodes, 140 U.Penn.L.Rev. at 740-41 (arguing that using section 1404(a) in this way amounts to "creat[ing] a new 'venue' statute *sua sponte*.").

Even if we could overcome these first two hurdles, there is a third, equally daunting, one. Section 1404(a), at least as interpreted outside the MDL context, carries a strong presumption that plaintiff's choice of forum will not be disturbed. The presumption can be overcome only by a *compelling* showing that the convenience of parties and witnesses will be served by the transfer. *See* 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, § 3848, at 383. This interpretation of section 1404(a) is consistent with the traditional rule, which gave plaintiffs almost complete power to select the forum, *see Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947) ("[T]he plaintiff's choice of forum should rarely be disturbed."), and a judicial recognition that, by

passing section 1404(a), Congress intended to disturb the plaintiff's choice of forum only for very strong reasons.[10]

In the MDL context, the traditional forum deference afforded plaintiffs disappears entirely. It's as if MDL courts are applying a mutated version of section 1404(a), one where a plaintiff's right to pick its venue has devolved to the significance of a tailbone or an appendix. Thus, MDL courts seldom even consider the rights of plaintiffs to their chosen forums, much less give this factor controlling weight. *See, e.g., Transgrud*, 70 Cornell L.Rev. at 809 ("When confronted with section 1404(a) motions, transferee courts have denied transfers only where those transfers would have put the parties in an improper venue or were requested prematurely."). Instead, concerns for judicial economy trump all others: "Since [a section 1404(a) transfer in the MDL context] involve[s] multiple cases, the rights, interests, and convenience of the individual parties [are] swept aside in the drive toward apparent judicial economy." Levy, 40 Fordham L.Rev. at 65; *see also* 15 Wright et al., § 3867, at 626 (when granting section 1404(a) transfers "notions of party and witness convenience, which typically are at the heart of transfer motions under Section 1404(a), may be subordinated to the type of judicial economy concerns that are central to Section 1407"); Richard A. Chesley & Kathleen W. Kolodgy, *Mass Exposure Torts: An Efficient Solution to*

---

[10] The Supreme Court in *Norwood v. Kirkpatrick*, 349 U.S. 29, 75 S.Ct. 544, 99 L.Ed. 789 (1955), upheld a section 1404(a) transfer away from a plaintiff's home forum, which would have been impermissible under the traditional forum non conveniens doctrine. The Court reasoned that section 1404(a) was intended to broaden the power of courts to order venue transfers. "[N]evertheless it has been consistently held since that decision that plaintiff's choice of a forum will not be disturbed unless the balance of convenience weighs heavily in favor of defendant." *Franklin v. Blaylock*, 218 F.Supp. 261, 262 (S.D.N.Y.1963), *aff'd sub nom. Blaylock v. McLean*, 319 F.2d 533 (2d Cir.1963) (citations omitted); *see also* Stephen C. Yeazell et al., *Civil Procedure* 193 (3d ed. 1992).

a Complex Problem, 54 U.Cin.L.Rev. 467, 525 (1985) ("[T]he efficiency standards of section 1407 many times overshadow the important individual concerns that the courts examine under section 1404.").

Section 1404(a), thus, has not only been conscripted by the federal courts to serve ends Congress never had in mind for it, it has also been stripped of the prudential constraints designed to protect plaintiff's choice of forum. What this means in practice is that self-transfers are not occasional, isolated events based on an unusually strong showing of judicial economy; they are the norm. The simple reality is that once a case is sucked into the MDL vortex, it seldom comes back. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d at 1178 (D.H. Ginsburg, J., concurring) ("In practice, the vast majority of transferred cases are so resolved, and do not return to the transferor courts."); *In re New York City Municipal Secs. Litig.*, 572 F.2d 49, 51 (2d Cir.1978) ("[H]istory has indicated that once the limited transfer has occurred, the transferor district is not likely to see the case again.").[11]

No case better illustrates the dangers of this practice than the one now before us. Applying normal 1404(a) standards, a venue transfer of this case from Chicago to Arizona would never have been granted; the convenience of the parties and witnesses would not have been served by such a transfer, much less clearly outweighed plaintiffs' right to choose their forum. Of the four witnesses who testified at trial, two were from Chicago, none from Arizona.[12] Plaintiffs were from Chicago, defendants from California but represented by a lawyer from Chicago. The

[11] I've found no case where an MDL court has been reversed for transferring a case to itself for trial.

[12] Of the 42 witnesses whose depositions had been noticed or taken at the time the request for remand was filed by Lexecon, only one was from Arizona. *See* Plaintiffs' Motion to Remand at 9. A very fine witness, to be sure, but still only one.

only connection between this case and Arizona was the trial judge.

Nor was the "interest of justice" clearly served by transfer to Arizona for trial. The trial lasted only five days and turned on Illinois law. *See Lexecon v. Milberg Weiss*, 884 F.Supp. 1388 (D.Ariz.1995) (applying Illinois law to Lexecon's defamation claim). Any advantage Judge Roll might have enjoyed in dealing with the facts was offset by the advantage a Chicago district judge would have had in instructing the jury as to Illinois law.[13]

No matter how you jiggle these factors, it's hard to come up with a plausible argument that trial in Arizona was more appropriate than trial in Chicago. Yet, as section 1404(a) is normally interpreted, a plaintiff's choice of forum can only be overcome if the transferee district is *clearly* more advantageous than the transferor district. Plaintiff's selection of its own home forum, when that forum is related to the subject matter of the suit, is entitled to even greater deference because both plaintiff and the community have an interest in resolving the controversy at home. *See, e.g., General Foam Plastics Corp. v. Kraemer Export Corp.*, 806 F.Supp. 88, 89 (E.D.Va. 1992); *Continental Airlines, Inc. v. American Airlines, Inc.*, 805 F.Supp. 1392, 1395-96 (S.D.Tex.1992).[14] In-

[13] This was not even a situation where the parties and witnesses were already going to trial on related claims so it would have been convenient to try this case at the same time. *Cf. In re Fine Paper*, 685 F.2d at 820 ("[P]laintiffs' convenience was outweighed by the comparative economy of trying one case in the Eastern District rather than several actions in the [plaintiffs'] home districts."). All other cases involving Lincoln Savings had long since been resolved.

[14] The rationale behind this rule is brought home by considering whether a Chicago or Arizona jury would better appreciate the following attempt by Lexecon's counsel to evoke sympathy for his client during summation:

stead, Lexecon was forced to trial in a forum where there was much popular feeling against Lincoln Savings, Charles Keating and those (like plaintiffs) who were associated with them.[15] It was also a forum where a respected district judge felt so strongly that plaintiffs' claim was unjustified that he found it necessary to recuse himself. *See* maj. op. at 1529.[16]

> And as a kid, I used to go into Chicago and see these great skyscrapers, and through them you would see Lake Michigan glimmering in the distance. And about this time of the year, the pavement would shimmer with heat. About right now in Chicago, people in Lexecon are getting out of work and they are going to their cars and going to the subway, and they are thinking maybe about what is happening out here, and wondering: Will Lexecon continue to be the kind of fine organization that Dan Fischel built it to be? Will they have a future?

RT at 234-35 (July 31, 1995).

[15] Not surprisingly, defense counsel peppered his arguments with references to Charles Keating's misdeeds and defendants' attempts to recover money for the victims, whom counsel described as "those retired people, the 23,000 people who got robbed, raped and peltered [sic] by Charles Keating." RT at 187 (July 31, 1991). Defense counsel also made much of the fact that, by settling the *Lincoln Savings* case, Lexecon avoided the verdict of an Arizona jury, and then ran off to Chicago and filed suit. *See id.* at 215 ("Now, as I said [before], if Lexecon wanted vindication, it could have taken its case to the jury. It did not. It paid $700,000. That is fine. But then it shouldn't have gone back to Chicago and thrown that $15 million brick at [defendants by filing suit]. It shouldn't have done that.").

[16] As the majority notes, Judge Bilby went so far as to amend the record in the earlier proceeding by entering an order explicating his view of the settlement and deriding Lexecon for having brought this lawsuit. Judge Bilby no doubt was sincere in his views but his order amounted to little more than testimony about his perception of the settlement. As this statement was not subject to the normal safeguards applicable to witnesses—such as cross-examination and impeachment—I find it troubling that the majority relies on it in characterizing Lexecon's case. *See* maj. op. at 1529-30.

Although Judge Roll had nothing to do with this order, he may have been influenced by his colleague's strong feelings, and thus

In ordering the self-transfer, the district court did not consider *any* of the traditional section 1404(a) factors. The court simply noted its familiarity with the case and concluded that it would be wasteful to have another judge conduct the trial. *See* Order, May 2, 1995. Such considerations of judicial economy—standing alone—have never before been sufficient to justify a section 1404(a) transfer. *See, e.g., Warrick v. General Electric Co.*, 70 F.3d 736, 740 (2d Cir.1995) (per curiam) (judicial economy "is not alone sufficient" to justify a transfer); *Wash. Pub. Util. Group*, 843 F.2d at 326 ("[A] federal court may not order transfer under section 1404(a) solely for its convenience."); *Codex Corp.*, 553 F.2d at 739 ("[W]e have found no case where [the desire for consolidation] has carried the day against factors pointing in the other direction."); *Max Planck v. General Elec. Co.*, 858 F.Supp. 380, 382 (S.D.N.Y. 1994) (noting that court expertise with the subject matter of a case is an "irrelevant" consideration under section 1404(a)). If familiarity with the case in a five-day, four-witness, one-horse trial is sufficient to justify a section 1404(a) transfer, the case simply does not exist where judicial economy will not trump a plaintiff's right to a trial in his home district.

The majority points to JPML Rule 14(b) as authority for Judge Roll's action. *See* maj. op. at 1533 n. 7. But the rule governs only the internal procedures of the JPML,

---

"we [might] consider prior judicial experience in such a situation more a negative than an affirmative reason for transfer." *Codex Corp. v. Milgo Electronic Corp.*, 553 F.2d 735, 739 (1st Cir.), *cert. denied*, 434 U.S. 860, 98 S.Ct. 185, 54 L.Ed.2d 133 (1977). Moreover, defense counsel repeatedly referred to the sentence from Judge Bilby's order characterizing Lexecon's complaint as "a false description of the conditions under which [it] was dismissed from [the *Lincoln Savings*] case." Defense counsel made sure the jury understood just who Judge Bilby was: "Judge Bilby learned of this lawsuit and Judge Bilby entered an order. The judge sitting across the street, the former Chief Judge of this district." RT at 193 (July 31, 1995).

not the authority of the district court. *See* J.P.M.L.R.Proc. 14(b) ("In the event that the transferee judge so transfers an action under 28 U.S.C. § 1404(a) or 1406, no further action of the Panel shall be necessary to authorize further proceedings including trial."). Nor could it, since section 1407(f) only empowers the JPML "to prescribe rules for the conduct of *its* business." 28 U.S.C. § 1407(f) (emphasis added).[17]

But even if Rule 14(b) somehow purported to do what the majority ascribes to it, we would still have to consider what weight to attribute to it. JPML rules are not subject to the rigorous promulgation process of the Rules Enabling Act: They are not voted upon by the Judicial Conference of the United States; they are not adopted by the Supreme Court; they are not put before Congress for possible modification or rejection. *See* 28 U.S.C. §§ 2072-74. Nor do they have the dignity of executive branch regulations promulgated pursuant to a substantive grant of rule-making authority. *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). The JPML's rules have the force of local district court rules, which are authorized by a statute almost identical to section 1407(f). *See* 28 U.S.C. § 2071(a) ("[A]ll courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."). As such, they are entitled to deference

---

[17] The JPML itself takes the position that it has no authority to tell MDL transferee courts what actions to take in the cases entrusted to them, including whether to grant section 1404(a) venue transfers. *See, e.g., In re Air Crash Disaster Near Chicago*, 476 F.Supp. at 450 ("[T]he Panel has neither the authority nor the desire to control decisions of the transferee judge made in the actual conduct of coordinated or consolidated pretrial proceedings[, including section 1404(a) determinations]."); *In re Westinghouse Electric Corp. Uranium Contract Litig.*, 436 F.Supp. 990, 996 (J.P.M.L.1977) ("The Panel has neither the power nor the inclination to dictate in any way the manner in which judges process actions pending before them.").

only to the extent they cover the JPML's business; they cannot broaden the transferee court's authority to act under section 1404(a). *See* 12 Wright et al., § 3153, at 228 ("[A] local rule is invalid if it makes 'basic procedural innovations' that should be left to the rulemaking power of the Supreme Court, surrounded, as that is, by statutory procedures that ensure mature consideration of informed opinion." quoting *Miner v. Atlass*, 363 U.S. 641, 650, 80 S.Ct. 1300, 1305-06, 4 L.Ed.2d 1462 (1960)); *see also* Jack B. Weinstein, *Reform of the Federal Rulemaking Process*, 63 A.B.A.J. 47, 47 (1977) ("There is no real opportunity even to challenge [local] rules in litigation since the judges who will decide the case are often the ones who adopted the rules.").

The majority also takes comfort from the fact that it reaches a result that is consistent with current practice—which must be the case given how seldom cases are returned for trial in the original district once they become ensnared in the MDL web. But a practice unsupported by thoughtful analysis, one that flies in the face of three clear statutory commands, surely is entitled to little weight. Moreover, this is not a case where we can read congressional silence as signifying approval of a particular statutory interpretation, a doctrine that is "at best treacherous," *Girouard v. United States*, 328 U.S. 61, 69, 66 S.Ct. 826, 829-30, 90 L.Ed. 1084 (1946), and at worst "a canard." *Johnson v. Transportation Agency*, 480 U.S. 616, 672, 107 S.Ct. 1442, 1472-73, 94 L.Ed.2d 615 (1987) (Scalia, J., dissenting); *see Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n. 1, 109 S.Ct. 2363, 2371 n. 1, 105 L.Ed.2d 132 (1989) (pointing out the "danger of placing undue reliance on the concept of congressional 'ratification' "). If acquiescence by silence can ever carry the day, it can do so only in areas such as the tax law where Congress exercises vigorous oversight or amends the statute frequently. Neither is the case here. Congress has amended the MDL statute only once in almost thirty

years [18] and there is no indication that any of its committees exercises oversight in this area.[19] To the contrary, this is an area where Congress relies on the judiciary to point out problems and propose solutions, as it did when section 1407 was first passed.

The MDL statute, it will be recalled, was the brainchild of the federal judiciary: The Coordinating Committee for Multiple Litigation in the U.S. District Courts, established by the Judicial Conference of the United States, brought the problem to the attention of Congress, wrote the statute, lobbied for its adoption and explained to Congress exactly how it would work. *See* H.R. 1130, *in* 1968 U.S.C.C.A.N. at 1899. The Coordinating Committee eschewed the possibility of trial in the transferee court,[20]

---

[18] In 1976, Congress added section 1407(h) to provide for consolidation of cases filed under a newly added section 4C of the Clayton Act. *See* Pub.L. No. 94-435, tit. III, § 303, 1976 U.S.C.C.A.N. (90 Stat. 1383, 1396.

[19] Congressional silence in the face of the self-transfer practice is especially problematic considering how inconspicuous the practice is. First, there are no accurate statistics on how many cases are subjected to self-transfer; neither the JPML nor the Administrative Office of the United States Courts nor the Federal Judicial Center keeps track. All we know is that lots of cases are subjected to the MDL process and very few ever get remanded. Second, the MDL statute continues to be portrayed as a mechanism affecting only pretrial, not trial, making "MDL appear to do less than it does." Judith Resnik, *From "Cases" to "Litigation"*, 54 Law & Contemp. Probs. 5, 47 (Summer 1991).

[20] The Committee stated that "[t]he major innovation proposed is transfer solely for pre-trial purposes," which would achieve efficiency "without losing the benefits of local trials." *Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28* (Mar. 2, 1965), *reprinted in In re Plumbing Fixture Cases*, 298 F.Supp. 484, 498, 499 (J.P.M.L.1968). As a result of the increased efficiency during pretrial, the Committee claimed that section 1407 would actually "*maximize* the litigant's traditional privileges of selecting where, when and how to enforce his substantive rights or assert his defenses." *Id.* (emphasis added).

and never mentioned self-transfer as even a remote possibility.[21] Congress clearly understood the limited nature of the proposal and invited the federal judges to return if authorization for consolidated trials became necessary. *See id.* at 1902. The judges never bothered to return; instead, they seized the power by prescription.

* * *

Despite the complicated nature of these proceedings, the question before us is rather straight-forward: Did the district court abuse its discretion in transferring the case to itself under section 1404(a)? It clearly did because MDL courts have no authority to pass on venue transfer motions, because section 1404(a) doesn't authorize self-transfer and because the factors favoring transfer are far too weak to overcome plaintiffs' right to a trial in their home district. We must therefore vacate that order and all subsequent orders entered by the district court, including, of course, the final judgment entered after trial.[22] The case should then be in a posture where plaintiffs would finally be free to petition the MDL panel for trans-

---

[21] The Coordinating Committee explained that Section 1407 "would not affect the place of trial in any case or exclude transfer under other statutes (e.g, Title 28, U.S.C. §§ 1404(a) and 1406(a)) prior to or at the conclusion of pre-trial proceedings." *Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28* (Mar. 2, 1965), 298 F.Supp. at 499. By using the phrase "prior to or at the conclusion of pre-trial proceedings," the Committee clearly indicated that a venue transfer would only be available before or after, but not while, the case was in the MDL court. *See* Comment, *Consolidation of Pretrial Proceedings*, 33 U.Chi.L.Rev. at 562.

[22] In point of fact, at the time Lexecon made its first request for remand on August 5, 1994, all coordinated and/or consolidated pretrial proceedings—to the extent there ever were any—had come to an end. All orders entered by the district court after that date were beyond its authority as they did not relate to the limited purpose for which the case was transferred under section 1407(a). *See* note 7 *supra*. These orders, particularly the summary judgment granted on April 24, 1995, should be vacated.

fer back to the Northern District of Illinois. By approving this transfer, we complete the judicial arrogation of power in this area and put the last coffin nail into the experiment Congress started in 1968 when it gave the federal courts only a limited MDL authority. I will not be one of the pallbearers. I dissent.